Supreme Court, U.S.
FILED
99 120 JUN 15 1999
OFFICE OF THE CLERK

No. 99-____

IN THE

Supreme Court of the United States

TUSCHNER & COMPANY, INC. and
JOHN M. TUSCHNER,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

James H. Schropp
Counsel of Record
FRIED, FRANK, HARRIS, SHRIVER & JACOBSON
1001 Pennsylvania Avenue, N.W.
Suite 800
Washington, D.C. 20004
(202) 639-7000

Michael L. Berde
FURBER TIMMER ZAHN, PLLP
One Financial Plaza, Suite 1100
One Twenty South Sixth Street
Minneapolis, Minnesota 55402-1801

Counsel for Petitioners

Balmar Legal Publishing Services, Washington, DC 20005 (202) 682-9800

QUESTIONS PRESENTED

1. Whether the district court had subject matter jurisdiction of a claim that the principal of a foreign broker, which transacted business with a United States broker registered as such under the federal securities laws for the purpose of acquiring securities traded in the United States on behalf of the foreign customers of the foreign broker, is an "associated person" of the United States broker or dealer, and thus subject to extensive regulation under United States laws and regulations applicable to broker-dealers and their personnel, in light of Congress' provision, in Section 30(b) of the Securities Exchange Act of 1934, that "[t]he provisions of this [Act]," and "any rule or regulation thereunder," "shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States," and the exemption of foreign brokers and dealers from registration and regulation set forth in Rule 15a-6(a)(4) under that Act.

2. Whether, on the facts alleged in the Complaint, the principal of a foreign broker was a "person associated with a broker or dealer" doing business in the United States, as that term is defined in Section 3(a)(18) of the Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(18).

LIST OF PARTIES

Petitioners Tuschner & Company, Inc. and John M. Tuschner were appellants below. Tuschner & Company, Inc. is a closely held corporation having no publicly held corporate parent or publicly held corporation owning 10% or more of its stock. Nicholas A. Zahareas and Euroamerican Securities, S.A. were also an appellants in the court of appeals. Euroamerican Securities, S.A. is a closely held foreign corporation engaged in the securities brokerage business in Athens, Greece, having no publicly held corporate parent or publicly held corporation owning 10% or more of its stock. The Securities and Exchange Commission, appellee below, is an agency of the United States.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 7

I. THE EIGHTH CIRCUIT'S DECISION IS IN CONFLICT WITH THE LAW OF OTHER COURTS OF APPEALS, WHICH HAVE PLACED APPROPRIATE LIMITATIONS ON THE EXTRATERRITORIAL REACH OF THE FEDERAL SECURITIES LAWS 7

II. THE LOWER COURTS ERRED IN EXTENDING REGULATORY PROVISIONS OF THE FEDERAL SECURITIES LAWS TO THE OPERATIONS OF A FOREIGN SECURITIES BUSINESS CONDUCTED ON FOREIGN TERRITORY 11

A. Registration and Regulation Requirements May Not be Imposed on a Foreign Broker in the Circumstances of this Case 11

B. The SEC's Own Prior Interpretations Confirm That a Foreign Broker's Activity Involving Foreign Persons Investing in U.S. Securities is Not Within the Scope of the SEC's Regulatory Authority 17

III. ZAHAREAS DID NOT BECOME AN "ASSOCIATED PERSON" OF TUSCHNER & CO. BY ENGAGING IN INDEPENDENT ACTIVITIES IN GREECE THAT ARE NOT SUBJECT TO REGULATION UNDER U.S. LAW 22

CONCLUSION 29

TABLE OF AUTHORITIES

Decisions **Page(s)**

Bear Stearns & Co., International Series Release No. 85, 43 SEC Docket (CCH) 608 (Jan. 7, 1976).....21

Bersch v. Drexel Firestone, Inc., 519 F.2d 974 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975)...7, 9

Blackmer v. United States, 284 U.S. 421 (1932).....14

Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252 (2d Cir. 1989).....9

Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc., 592 F.2d 409 (8th Cir. 1979).....8

Europe and Overseas Commodity Traders, S.A. v. Banque Paribas London, 147 F.3d 118 (2d. Cir. 1998), *cert. denied* 119 S. Ct. 1029 (1999).....7, 8, 9

EEOC v. Arabian Amer. Oil Co., 499 U.S. 244 (1991).....14

Foley Brothers v. Filardo, 336 U.S. 281 (1949).....14

Grunenthal GmbH v. Hotz, 712 F.2d 421 (9th Cir. 1983).....8

Guhlke v. Roberts Truck Lines, 128 N.W. 2d 324 (Minn. 1964).....25

Kauthar SDN BHD v. Sternberg, 149 F.3d 659 (7th Cir. 1998).....8

Kook v. Crang, 182 F. Supp. 388 (S.D.N.Y. 1960).....14

Plessey Co. PLC v. General Electric Co. PLC, 628 F. Supp. 477 (D. Del. 1986).....9

Psimenos v. E.F. Hutton & Co., 722 F.2d 1041 (2d Cir. 1983).....8

Robinson v. TCI/US West Communications, Inc., 117 F.3d 900 (5th Cir. 1997).....8

Schoenbaum v. Firstbrook, 405 F.2d 200, *modified on other grounds*, 405 F.2d 215 (2d Cir. 1968), *cert. denied*, 395 U.S. 906 (1969).....8

SEC v. Kasser, 548 F.2d 109 (3d Cir.), *cert. denied*, 431 U.S. 938 (1977) 8

SEC v. Nappy, 1993 WL 535401 (N.D. Ill. Dec. 17, 1993) 24

SEC v. Telsey, 1991 WL 72854 (S.D.N.Y. Mar. 13, 1991) 24

Sinva, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 48 F.R.D. 385 (S.D.N.Y. 1969) 14

In re Nicholas Zahareas, Securities Exchange Act Release No. 32676 (July 27, 1993) 3

Zoelsch v. Arthur Andersen & Co., 824 F.2d 27 (D.C. Cir. 1987) 8

Statutes and Rules

SECURITIES ACT OF 1933

Rule 902(a), 17 C.F.R. 239.902(a) 3

SECURITIES EXCHANGE ACT OF 1934

Section 3(a)(4), 15 U.S.C. § 78c(a)(4) 2, 12, 17

Section 3(a)(5), 15 U.S.C. § 78c(a)(5) 2, 12, 17

Section 3(a)(18), 15 U.S.C. § 78c(a)(18) ..... *passim*

Section 3(a)(39), 15 U.S.C. § 78c(a)(39) 2

Section 3(a)(39)(B)(i)(II), 15 U.S.C. § 78c(a)(39)(B)(i)(II) 21

Section 7, 15 U.S.C. § 78g 2

Section 7(f)(2), 15 U.S.C. § 78g(f)(2) 15

Section 13(d), 15 U.S.C. § 78m(d) 9

Section 15(a), 15 U.S.C. § 78o(a) 2, 11

Section 15(b), 15 U.S.C. § 78o(b) 2

Sections 15(b)(6)(B)(i) and (ii), 15 U.S.C. § 78o(b)(6)(B)(i) and (ii) 5

Section 17(a), 15 U.S.C. § 78q(a) 12

Section 17(b), 15 U.S.C. § 78q(b) 12

Section 21(e), 15 U.S.C. § 78u(e) 5

Section 23(a), 15 U.S.C. § 78w(a) 2

Section 27, 15 U.S.C. § 78aa 5

Section 30(b), 15 U.S.C. § 78dd(b) ..... *passim*

Rule 15a-6, 17 C.F.R. § 240.15a-6 ..... *passim*

Rule 15a-6(a)(1), 17 C.F.R. § 240.15a-6(a)(1) 20

Rule 15a-6(a)(2), 17 C.F.R. § 240.15a-6(a)(2) 20

Rule 15a-6(a)(3), 17 C.F.R. § 240.15a-6(a)(3) 20, 21

Rule 15a-6(a)(3)(ii)(B)(i), 17 C.F.R. § 240.15a-6(a)(3)(ii)(B)(1) 21

Rule 15a-6(a)(4), 17 C.F.R. § 240.15a-6(a)(4) ..... *passim*

Rule 15a-6(a)(4)(iii), 17 C.F.R. § 240.15a-6(a)(4)(iii) 15

Rule 15a-6(b)(3), 17 C.F.R. § 240.15a-6(b)(3) 15

28 U.S.C. § 1254(i) 2

Miscellaneous

Ezra Weiss, Registration and Regulation of Brokers and Dealers 32 (1965) 13

Louis Loss & Joel Seligman, VI Securities Regulation (3d ed. 1997) 15

Hearings Before a Subcomm. of the Senate Comm. on Banking and Currency, 88th Cong. 1st Sess. at 360-61 (1964); S. Rep. No. 88-379, Report of the Comm. on Banking and Currency to accompany S.1642, 72 (1964) 23

Securities Act Release No. 4708, 29 Fed. Reg. 9828 (1964) 17, 18

Securities Exchange Act Release No. 27017, 54 Fed. Reg. 30013 (1989) ..... *passim*

Securities Exchange Act Release No. 25801, 53 Fed. Reg. 23645 (1988) ..... *passim*

No. 99-____

IN THE

Supreme Court of the United States

TUSCHNER & COMPANY, INC. and
JOHN M. TUSCHNER,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Tuschner & Company, Inc. and John M. Tuschner, defendants below, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, which affirmed the District Court's entry of an order of preliminary injunction.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-7a, *infra*) is reported at 167 F.3d 396 (8th Cir. 1999). The opinion of the district court (Pet. App. B, pp. 8a - 27a, *infra*) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1999. A petition for rehearing and rehearing *en banc* was denied on April 16, 1999. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following statutory and regulatory provisions, relevant to this case, are set forth in App. C, pp. 28a - 35a, *infra*:

The Securities Exchange Act of 1934, 15 U.S.C. § 78a et seq.:

Section 3(a)(4), 15 U.S.C. § 78c(a)(4)
Section 3(a)(5), 15 U.S.C. § 78c(a)(5)
Section 3(a)(18), 15 U.S.C. § 78c(a)(18)
Section 3(a)(39), 15 U.S.C. § 78c(a)(39)
Section 7, 15 U.S.C. § 78g
Section 15(a), 15 U.S.C. § 78o(a)
Section 15(b), 15 U.S.C. § 78o(b)
Section 23(a), 15 U.S.C. § 78w(a)
Section 30(b), 15 U.S.C. § 78dd(b)

Rule under the Securities Exchange Act of 1934:

Rule 15a-6, 17 C.F.R. § 240.15a-6

STATEMENT OF THE CASE

In early 1996, Tuschner & Company, Inc. ("Tuschner & Co."), a registered broker-dealer doing business in Minneapolis, acted as the underwriter of the initial public offering of ACT Teleconferencing, Inc. ("ACT"), a company located in Colorado which sells telecommunications services and equipment. In connection with that offering, the chief executive officer of ACT introduced John M. Tuschner, the head of Tuschner & Co., to Nicholas A. Zahareas ("Zahareas"), a United States citizen residing in Athens, Greece. Zahareas was the president and majority shareholder of Euroamerican Securities, S.A. ("Euroamerican"), a Greek broker-dealer and financial consulting firm doing business in Athens.[1] John Tuschner was advised that certain of Zahareas'

---

[1] Euroamerican is, as described by the SEC in the district court, a member of the European Association of Securities Dealers, a broker-

customers had invested in ACT prior to its public offering and that a number of these clients were also interested in investing in ACT's initial public offering. Pet. App. 10a.

Prior to doing any business, Zahareas advised Tuschner & Co. that he had formerly been employed as a registered representative of a United States broker-dealer, but that he could no longer act in that capacity, as the result of a disciplinary bar order entered against him by the Securities and Exchange Commission ("^EC") in 1993.[2] Tuschner & Co. determined that the bar order raised no legal impediment to conducting business with Zahareas and Euroamerican, as representatives of investors domiciled in Greece who wished to invest in United States securities. Subsequently, twelve Greek customers of Euroamerican opened accounts at Tuschner & Co. and were among the investors who purchased ACT common stock and warrants in connection with its initial public offering.

After the closing of its public offering on March 12, 1996, ACT's securities were listed and traded on the NASDAQ over-the-counter market and Tuschner & Co. acted as a market-maker in ACT securities. In that capacity,

---

dealer organization headquartered in Brussels. The Association has been officially recognized by the SEC as a "designated offshore securities market," within the meaning of Rule 902(a) of Regulation S under the Securities Act of 1933. *See* SEC Letter Ruling dated January 22, 1998, annexed to Tuschner & Co.'s Reply Brief filed in the court of appeals on May 29, 1998. As stated by the SEC, Euroamerican holds itself out as a full-service brokerage firm which provides "access to [the] European Capital Markets for [G]reek companies," and markets "high quality investment products to institutional and individual [G]reek investors." Miller Aff. ¶ 9 and Ex. C thereto.

[2] Pet. App. 10a. As set forth at ¶ 10 of the SEC's Complaint, Zahareas was charged in an administrative proceeding with violations of the antifraud provisions of the securities laws. Without admitting or denying the SEC's allegations, Zahareas consented to the entry of an order "barring him from association" with any registered broker, dealer or other SEC-regulated entities. *See In re Nicholas Zahareas*, Securities Exchange Act Release No. 32676 (July 27, 1993) (hereinafter referred to as the "bar order").

Tuschner & Co. was advised by Zahareas that other Greek customers of Euroamerican desired to acquire ACT securities and perhaps other securities traded in the United States markets. The two firms therefore entered into an agreement as to how such securities transactions would be effected on behalf of Greek customers. Pet. App. 11a.

Pursuant to that agreement, Euroamerican obtained from each of its customers who desired to effect transactions in securities traded in United States markets the information necessary to open a new account, and forwarded it to Tuschner & Co. by telecopier. After an account was opened at Tuschner & Co. for a Greek customer, Euroamerican ascertained the transactions which that customer desired to effect, and transmitted the customer's directions to Tuschner & Co. in Minneapolis, either by telephone or telecopier. Tuschner & Co. was responsible for obtaining the best available execution for the Greek customers' accounts, and for mailing confirmations regarding each order executed, as well as monthly statements, directly to the customers. The two firms agreed that no purchase order would be executed until the funds necessary to pay for the securities had been deposited into the account; transfers of funds were generally accomplished by wire transfer. Finally, it was agreed that Greek customers would be charged transaction commissions pursuant to the same schedule that Tuschner & Co. used with respect to its domestic customers, with a portion of the commissions being retained by Tuschner & Co. and the remainder remitted to Euroamerican, for distribution to its personnel at its discretion.

Doing business in this manner through August 1997, approximately 200 accounts were opened at Tuschner & Co. on behalf of Greek customers. Pet. App. 11a. In August 1997, the Securities and Exchange Commission ("SEC") initiated an investigation into the activities of Euroamerican and Tuschner & Co. When it appeared that the SEC's concerns could not immediately be resolved, Tuschner & Co. wrote to Euroamerican in early September 1997, requesting that, until the issues raised by the SEC could be addressed,

Euroamerican make arrangements with its customers to transfer their accounts elsewhere. Pet. App. 12a. Such arrangements were completed by late 1997, and the two firms have not done any business together since then. Pet. App. 12a.

Nevertheless, the SEC filed an action on December 19, 1997, against Tuschner & Co., John M. Tuschner and Nicholas Zahareas, alleging violations of Sections 15(b)(6)(B)(i) and (ii) of the Securities Exchange Act of 1934 ("Exchange Act").[3] These subsections make it unlawful for any person subject to a bar order to become "associated" with a registered broker or dealer, or for a broker or dealer to permit such a person to become "associated" with it. Jurisdiction was asserted in the district court pursuant to Sections 21(e) and 27 of the Exchange Act, 15 U.S.C. §§ 78u(e) and 78aa. The SEC's Complaint contained no allegation that the antifraud provisions of the securities laws had been violated by any defendant, that any investor had been injured, or that the United States securities markets had been adversely affected in any way.

In response to the SEC's motion, the district court, in an Order entered on January 28, 1998, entered a preliminary injunction against all defendants. In its Order, the district court rejected, *inter alia*, the defendants' contentions that Section 30(b) and Rule 15a-6 precluded subject matter jurisdiction of the SEC's claim that Zahareas was an unregistered "associated person" of Tuschner & Co. Pet. App. 14a-15a. The district court, in its analysis, characterized Euroamerican as a "remote location" of Tuschner & Co., and found that Zahareas' activities in Greece were "similar to those of a Tuschner & Co. broker at a remote location" of Tuschner & Co. in Athens. Accordingly, in the district

---

[3] Euroamerican Securities, S.A. was named in that action as a "Relief Defendant." The relief sought by the SEC against the defendants and "relief defendant" included a temporary restraining order, preliminary and permanent injunctions, disgorgement of "ill-gotten gains," and civil monetary penalties in an unspecified amount.

court's view, Zahareas had "essentially become an employee" of Tuschner & Co. and he was, accordingly, an "associated person" of the latter. Pet. App. 21a-22a.

On appeal to the Court of Appeals for the Eighth Circuit, a majority of the panel affirmed the entry of the preliminary injunction, without further analysis, "for the reasons set forth in the district court's opinion." Pet. App. 3a. In dissent, Judge Morris Sheppard Arnold noted that "[t]he SEC argued below, and the trial court held, that the acts performed by Mr. Zahareas and Euroamerican were similar to those performed by an employee, and that Mr. Zahareas was therefore an 'associated person' of Tuschner & Co." Pet. App. 3a. The dissent then pointed out the flaw in this contention:

> The difficulty with this holding . . . is that the parenthetical language relied upon by the SEC and the trial court for this proposition ("or any person occupying a similar status or performing similar functions"), is located directly after the portion of the definition referring to partners, officers, directors, and branch managers. This language does not in any way purport to modify the part of the statute that defines employees, and thus cannot expand the definition of an employee. Therefore only actual employees (and not persons similar to employees) can be "associated persons."

Pet. App. 4a.

Noting that, on appeal, the SEC had "abandoned" its district court position, that Zahareas was "similar to" an employee of Tuschner & Co., "in favor of an argument that Mr. Zahareas was an 'associated person' because he was under Tuschner & Co.'s control," Pet. App. 4a, the dissent rejected this newly-advanced contention as well, since none of the activities which the SEC cited as evidence of "control" were "inconsistent with two separate companies doing business with each other." *Id.* Under the facts alleged and shown, therefore, "neither [firm] was legally under the control

of the other" and "the SEC has failed to establish that Mr. Zahareas was under Tuschner & Co.'s control." Pet. App. 5a.

REASONS FOR GRANTING THE WRIT

I. THE EIGHTH CIRCUIT'S DECISION IS IN CONFLICT WITH THE LAW OF OTHER COURTS OF APPEALS, WHICH HAVE PLACED APPROPRIATE LIMITATIONS ON THE EXTRATERRITORIAL REACH OF THE FEDERAL SECURITIES LAWS

As cross-border investment activities have increased and securities transactions have become more international in scope, disputes involving the extraterritorial application of the federal securities laws have likewise proliferated. Because Congress did not specify the manner and extent to which the federal securities laws were intended to apply outside the territorial limits of the United States,[4] the lower courts, when they have encountered this issue, have charted a prudent course, one that takes appropriate account of the facts and circumstances of the specific transactions in issue and the purposes of the specific provision under which liability is asserted. The ultimate consideration to be addressed is "whether Congress would have wished the precious resources of the United States courts and law enforcement agencies to be devoted to" the specific matter in issue. *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 985 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975). While Congress' power to impose liability on participants in predominantly foreign securities transactions is "limited only by the Due Process Clause of the Fifth Amendment," courts have recognized that Congress could not have intended to "reach this constitutional limit." *Europe and Overseas Commodity Traders, S.A. v. Banque*

---

[4] Courts have had to consider issues regarding the extraterritorial application of the securities laws "in the absence of clear Congressional guidance as to the jurisdictional reach" of these laws. *Europe and Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 125 (2d Cir. 1998).

Paribas London, 147 F.3d 118, 127 (2d Cir. 1998), *cert. denied* 119 S. Ct. 1029 (1999).

In prior decisions involving the extraterritorial application of the antifraud provisions of the federal securities laws, lower courts have developed and applied two tests, generally referred to as the "conduct" test and the "effects" test. First, "courts have reasoned that Congress would not want the United States to become a base for fraudulent activity harming foreign investors," *Europe and Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d at 125; accordingly, the antifraud provisions have been held to apply to "conduct" found to be causally related to the fraud and the resultant harm to foreign investors. *See Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1045 (2d Cir. 1983).[5] In addition, courts have also reasoned that Congress would also want to redress harms, or "effects," perpetrated by activities conducted from abroad which have a substantial effect on investors or markets in the United States. *See Schoenbaum v. Firstbrook*, 405 F.2d 200, 206, *modified on other grounds*, 405 F.2d 215 (2d Cir. 1968) (*en banc*), *cert. denied*, 395 U.S. 906 (1969); *Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 261-262 (2d Cir. 1989).

---

[5] In addition to the Second Circuit, several other courts of appeals have applied some variation of the "conduct" test. *SEC v. Kasser*, 548 F.2d 109, 114 (3d Cir.), *cert. denied*, 431 U.S. 938 (1977) (jurisdiction if "at least some activity designed to further a fraudulent scheme occurs within this country"); *Robinson v. TCI/US West Communications, Inc.*, 117 F.3d 900, 905-906 (5th Cir. 1997) (adopting Second Circuit's position as the "better reasoned of the competing positions"); *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 667 (7th Cir. 1998) (jurisdiction if "the conduct occurring in the United States directly causes the plaintiff's alleged loss in that the conduct forms a substantial part of the alleged fraud and is material to its success"); *Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409, 421 (8th Cir. 1979) (jurisdiction where the domestic conduct "was in furtherance of a fraudulent scheme and was significant with respect to its accomplishment"); *Grunenthal GmbH v. Hotz*, 712 F.2d 421, 425 (9th Cir. 1983) (same); *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27 (D.C. Cir. 1987) (jurisdiction "where the domestic conduct comprises all the elements . . . necessary to establish a violation" of the antifraud provisions).

The lower courts have recognized that the antifraud provisions of the federal securities laws, in light of their broad objectives, should be afforded a broader extraterritorial reach than other, "regulatory" or "filing" provisions. *Consolidated Gold Fields*, 871 F.2d at 262; *Europe and Overseas Commodity Traders*, 147 F.3d at 125. In *Plessey Co. PLC v. General Electric Co. PLC*, 628 F. Supp. 477 (D. Del. 1986), the court held that subject matter jurisdiction was lacking where the plaintiff sought to compel a tender offerer to file stock ownership reports required by the Williams Act. *See* 15 U.S.C. § 78m(d). Citing this case with approval in *Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d at 262, the Second Circuit pointed out that, in *Bersch v. Drexel Firestone, Inc.*, 519 F.2d at 986, it had held that "the antifraud provisions of American securities laws have broader extraterritorial reach than American filing requirements." Recently, in *Europe and Overseas Commodity Trades, S.A. v. Banque Paribas London*, 147 F.3d at 124, the Second Circuit reaffirmed the validity of this principle, rejecting an argument that the "same standard" should apply to the antifraud provisions and the securities registration provisions of the Securities Act of 1933. Instead, the Court held, the analysis of subject matter jurisdiction must be guided by "the nature and source of the claim asserted."

The courts below rejected the defendants' contention that subject matter jurisdiction of the SEC's claims in this case was lacking, holding that a district court "has jurisdiction over transnational securities cases where some activity involving a violation of the Exchange Act occurred in this country." Pet. App. 14a. So long as there is this level of activity, there is no need to show "economic harm as a result of the illegal activity." *Id.* The district court "conclude[d] that sufficient activity of the defendants alleged by the [SEC] to be in violation of the Exchange Act and prior [SEC] bar order occurred in this country;" as noted, the court of appeals affirmed for the reasons stated by the district court. Pet. App. 15a, 3a.

In so holding, the lower courts failed to take into account the purpose of the specific Exchange Act provision here in issue, and to tailor its extraterritorial scope to that specific purpose, as other courts have done. Without any reference to the purpose or objective of the specific statutory provision in issue, the courts below departed from the approach crafted by the other courts of appeal, and essentially held that subject matter jurisdiction exists to hear claims of a violation of any provision whenever "*some*" conduct related to the claim occurs in the United States.

Equally importantly, the lower courts failed to take into account the fact that the scope of the provision regarding the registration of "associated persons" of brokers and dealers must be construed in light of Congress' explicit prohibition upon the extension of regulation, under the Exchange Act, to a foreign "business in securities" which transacts business "without the jurisdiction of the United States." 15 U.S.C. § 78dd(b). The lower courts ignored, as well, the SEC's own regulatory finding that a foreign broker-dealer which does no more than effect transactions "with or for" a registered United States broker is not conducting business within the jurisdiction of the United States sufficient to require the registration and regulation of the foreign broker under the Exchange Act. 17 C.F.R. § 240.15a-6(a)(4).

The lower courts thus abandoned the anchors which have previously grounded extraterritoriality jurisprudence. In this case, a regulatory provision of the securities laws, regarding the registration of "associated persons" of United States securities firms, was held to require the registration, as such an "associated person," of a principal of a foreign broker-dealer doing routine securities-related transactions with a United States broker. The theory which supposedly supported this unprecedented expansion – that the foreign principal, by virtue of nothing more than doing business with a United States broker-dealer, became the equivalent, for statutory purposes, of a controlled "employee" of the United States broker-dealer – is not supported by the facts alleged or demonstrated by the SEC. Of even greater significance,

however, this expansion in the extraterritorial application of the law was precluded by Congress in the one provision it enacted touching upon the international reach of the Exchange Act, Section 30(b)'s preclusion of applicability of any provision of that Act "to any person insofar as he transacts a business in securities without the jurisdiction of the United States . . . ."

The rule adopted by the lower courts would permit the SEC to regulate, as purported "associated persons" of the United States brokers with which they do business, the personnel of foreign broker-dealers who do nothing more than effect routine securities transactions with United States brokers and dealers. This Court should grant a writ of certiorari in order to correct the Eighth Circuit's departure from the law developed by the courts of appeals regarding the appropriately limited extraterritorial reach of the federal securities laws.

II. THE LOWER COURTS ERRED IN EXTENDING REGULATORY PROVISIONS OF THE FEDERAL SECURITIES LAWS TO THE OPERATIONS OF A FOREIGN SECURITIES BUSINESS CONDUCTED ON FOREIGN TERRITORY

A. Registration and Regulation Requirements May Not be Imposed on a Foreign Broker in the Circumstances of this Case.

Section 15(a) of the Exchange Act, 15 U.S.C. § 78o(a), requires that any "broker" or "dealer" who uses the mails or any instrumentality of interstate or international commerce must register with the SEC. In the Exchange Act, Congress defined the terms "broker" and "dealer" broadly to include all persons who perform the commercial functions described in the definition, without reference to the nationality or geographic location of the person performing the activity.[6] Registration under the Exchange Act as a

---

[6] The statutory distinction between a "broker" and a "dealer" is that the former acts as an agent for his client while the latter acts as a principal

broker-dealer, and regulation pursuant to that Act, go hand-in-hand. After registration, brokers-dealers and their personnel are subject to thorough SEC regulation and oversight. Among other things, all regulated persons may be examined at any time, without need for summons or prior notice, and are required to produce such records to the SEC as the agency may demand to inspect.[7]

Notwithstanding the broad statutory scope of the terms "broker" and "dealer," it is certain that Congress did not expect, in 1934, that brokers or dealers located and doing business anywhere in the world were thereafter to be subject to the regulatory system created to apply to U.S. securities professionals, simply by virtue of having some business-related contact with the United States. Unlike Congressional intent with respect to the extraterritorial reach of the anti-fraud provisions, however, one need not surmise on this point: to ensure that it had given effect to this intent, Congress included, in the Exchange Act's original provisions, Section 30(b), 15 U.S.C. § 78dd(b), providing (emphasis supplied):

> The provisions of [the Securities Exchange Act] or of any rule or regulation thereunder **shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States,** unless he transacts such business in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate to prevent the evasion of this [Act].

No rules or regulations have ever been prescribed by the SEC pursuant to Section 30(b).

---

in a transaction with his client. 15 U.S.C. § 78c(a)(4), (5). The term "broker-dealer" is not a statutorily-defined term, but is used herein to designate a person who is within either the statutory definition of "broker" or "dealer," or both.

[7] *See, e.g.*, Exchange Act Section 17(a) (brokers shall "make and keep" such records as prescribed by the SEC); and 17(b) (brokers' records are subject "at any time" to examination by the SEC), 15 U.S.C. § 78q(a) and (b).

Section 30(b)'s reference to business conducted "without the jurisdiction of the United States" was intended to provide a broader exclusion than one that would apply only to foreign brokers having no contacts with the United States through international communications and other channels of commerce. Indeed, it would be unnecessary for Congress to provide such an exemption; without *some* use of the jurisdictional means, there would be no basis upon which the statute *could* apply. As one influential treatise on broker-dealer regulation aptly stated:

> A discussion of the subject of [federal] jurisdiction over brokers and dealers would not be complete without reference to Section 30(b) of the Act . . . .
>
> In approaching a problem as to the applicability of Section 30(b) to a given situation, *it may be assumed that the business under scrutiny was transacted by use of jurisdictional means.* The manifest purpose of the Section is to deal with transactions which would otherwise come within the compass of the Act, and to exempt them from its scope because the basic Congressional concern is with domestic conditions.[8]

Accordingly, the phrase "without the jurisdiction of the United States," as applied to foreign broker-dealer operations, refers to operations conducted outside the *territorial* limits of U.S. jurisdiction. This is, of course, consistent with the "longstanding principle" of statutory construction, that legislation enacted by Congress, unless a contrary intent plainly appears, is meant to apply only within the territorial jurisdiction of the United States. *EEOC v. Arabian Amer. Oil Co.*, 499 U.S. 244, 248 (1991). With respect to business regulatory matters, Congress is presumed to be primarily concerned with domestic conditions. *Foley Brothers, Inc. v. Filardo*, 336 U.S. 281 (1949); *Blackmer v. United States*, 284

---

[8] Ezra Weiss, REGISTRATION AND REGULATION OF BROKERS AND DEALERS 32 (1965) (emphasis supplied).

U.S. 421 (1932). This principle is reinforced in this particular case, since the Act itself, in Section 30(b), "specifically restricts the Act to the transaction of business within the United States." *Kook v. Crang*, 182 F. Supp. 388, 390 (S.D.N.Y. 1960); *Sinva, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 48 F.R.D. 385 (S.D.N.Y. 1969).

With reference to the scope of its regulation of broker-dealers, and consistent with the provisions of Section 30(b), the SEC itself has specifically acknowledged that it

> uses a **territorial approach** in applying the broker-dealer registration requirements to the international operations of broker-dealers. Under this approach, all brokers *physically operating within the United States* that effect, induce, or attempt to induce any securities transactions would be required to register as broker-dealers with the Commission, even if these activities were directed only to foreign investors outside the United States.[9]

With respect to the activities of foreign-based broker-dealers, the SEC has also utilized a "territorial approach," one which focuses upon the physical location of the foreign broker's *customer* within the United States, subject to an exception for dealings with foreign investors who are only *temporarily* present within U.S. territory. Thus, the SEC has stated:

> In addition to requiring broker-dealer operations physically located within the United States to register, the Commission's **territorial approach** generally would require broker-dealer registration by foreign broker-dealers that, from outside the United States, induce or attempt to induce trades by any person *in the United States*. The Commission would not require registration, however, of foreign broker-dealers dealing from

---

[9] Securities Exchange Act Release No. 27017, 54 Fed. Reg. 30013, 30016 (1989) (hereinafter "Release 27017") (emphasis supplied).

abroad with foreign persons domiciled abroad *but temporarily present in this country.*[10]

Finally, the SEC has agreed that the exemption from regulation under the Exchange Act provided by Section 30(b) applies to the extraterritorial activities of *any* person or entity, whether that person is a foreign or U.S. person. As the SEC has stated, "U.S. entities would not be required to register if they conducted their sales activities entirely outside the United States."[11] Consistent with this interpretation, the definition of the term "*foreign* broker-dealer" developed by the SEC "expressly includes *any U.S. person* engaged in business as a broker or dealer entirely outside the United States."[12] Thus, the status of Zahareas as a citizen of the United States is of no relevance in this case. As noted, the SEC itself has recognized that U.S. broker-dealer regulation was "not intended to protect foreign persons" who may choose to deal with "securities professionals outside the United States;" rather, "the primary responsibility for protecting foreign investors from wrongful conduct of foreign

---

[10] *Id.* (emphasis supplied), 54 Fed. Reg. at 30017. Thus, it has been recognized that the SEC would not seek to apply the Exchange Act's broker-dealer regulatory provisions to, *e.g.*, a Canadian broker who sold his client securities, by telephone, while the client was vacationing in Florida. Louis Loss & Joel Seligman, VI SECURITIES REGULATION 3027, n.145 (3d ed. 1997). This long-recognized exception to the general territorial principle was eventually codified in 1989 in SEC Rule 15a-6(a)(4)(iii), 17 C.F.R. § 240.15a-6(a)(4)(iii).

[11] Release 27017, 54 Fed. Reg. at 30016.

[12] *Id.* (emphasis supplied), 54 Fed. Reg. at 30020. The definition of "foreign broker or dealer" is set forth in Rule 15a-6(b)(3), 17 C.F.R. § 240.15a-6(b)(3). The term "U.S. person," used in this definition, is defined in Section 7(f)(2) of the Exchange Act as including any natural person who is a U.S. citizen or resident and any entity created under the law of any state. 15 U.S.C. § 78g(f)(2).

securities professionals properly lies with foreign securities regulators."[13]

In the context of this case, application of the foregoing principles should have indicated that Greek securities regulators – **not** the United States Securities and Exchange Commission – were responsible for regulating the activities conducted in Greece by Euroamerican, and its principal, Zahareas. However, the SEC abandoned these principles, and erroneously advised the District Court that the "Greek customers . . . are deserving of the protection of the U.S. securities laws."[14] Thus, the SEC asserted, contrary to its prior pronouncements, that Congress did intend to extend to Greek and other foreign investors the purported "protection" that would be afforded them by requiring foreign brokers like Zahareas to register as an "associated person" of Tuschner & Co., and be subject to regulation under the SEC-administered system of broker-dealer regulation. This contention, and the lower courts' acceptance of it, was in error.

No one contests that the Greek investors, by virtue of doing business with a registered broker, did enjoy substantial protection under the federal securities laws. If Tuschner & Co. were to have violated, for example, the antifraud provisions of the securities law and thereby injured Greek investors, those investors could certainly have proceeded directly against Tuschner & Co. in federal courts under federal law; or the SEC itself is statutorily authorized to do so. Greek investors may, as well, have had remedies under Greek law. But those protections afforded by the broker-dealer registration and regulatory provisions of the federal securities laws were, indeed, never "intended to protect foreign persons," as the SEC previously recognized.[15] To seek to

---

[13] Exchange Act Release No. 25801, 53 Fed. Reg. 23645, 23649 (1988) (hereinafter "Release 25801").

[14] SEC TRO Memo (filed Jan. 15, 1998) at 18.

[15] Release 25801, 53 Fed. Reg. at 23649.

protect Greek investors by requiring Greek broker personnel to submit to the U.S. broker-dealer regulatory regime, as the SEC has here sought to do, is not only misguided. It is, quite simply, outside the scope of what the statute permits the SEC to do: "[t]he provisions [of the Exchange Act] . . . shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States . . . ." 15 U.S.C. 78dd(b).

B. The SEC's Own Prior Interpretations Confirm That a Foreign Broker's Activity Involving Foreign Persons Investing in U.S. Securities is Not Within the Scope of the SEC's Regulatory Authority

In 1964, in Securities Act Release No. 4708, the SEC first articulated the conditions under which a foreign underwriter participating in a United States issuer's public offering of securities would not be deemed to be within the Act's broker-dealer regulatory provisions, and thus not required to register as a broker-dealer under Section 15(a) of the Exchange Act.[16] In that Release, the SEC indicated that registration as a broker-dealer was not required if the foreign broker-dealer limited its participation in a multinational offering of U.S. securities to selling securities outside the United States to non-U.S. persons – *exactly* as Euroamerican and Zahareas did in connection with the initial public offering of ACT.[17] Following the issuance of Release 4708, the SEC

---

[16] Securities Act Release No. 4708, 29 Fed. Reg. 9828 (1964) (hereinafter "Release 4708"). The term "underwriter" is not defined in the Exchange Act, but an "underwriter" would necessarily come within either the statutory definition of a "broker" (if he acted as agent in connection with the issuer's sale of securities to an investor) or "dealer" (if he purchased the securities for his own account and resold them to the public). *See* Exchange Act §§ 3(a)(4), 3(a)(5), 15 U.S.C. § 78c(a)(4), (5).

[17] Release 4708, 29 Fed. Reg. 9828. In Release 4708, the SEC acted to clarify the scope of its regulation of broker-dealers in a multinational setting in order to eliminate uncertainties about the application of the federal securities law which had been responsible for discouraging foreign brokers from selling investments in U.S. enterprises, and to take a modest

followed the principles articulated in that Release in evaluating the need for the regulation of entities engaged in other types of securities activities conducted primarily outside the United States and primarily with non-U.S. investors. In addition, the SEC's formal interpretative position that broker-dealer registration was not required where either foreign or U.S. broker-dealer firms sold *newly-issued* securities to non-U.S. persons outside the United States was extended by the SEC to cover such sales where the securities were obtained *in U.S. secondary markets, through a registered broker-dealer* – again, *exactly* as Euroamerican and Zahereas did with respect to transactions in the United States secondary markets.[18] This position was, the SEC stated, equally applicable to trading done on either a "fully-disclosed" or an "omnibus" basis.[19]

---

step, at the request of the Johnson Administration's Presidential Task Force (appointed October 1963) on Promoting Increased Foreign Investment in United States Corporate Securities and Increased Foreign Financing for United States Corporations Operating Abroad, to alleviate this nation's chronic balance of payments imbalance. Release 4708, 29 Fed. Reg. 9828. Today, the nation's balance of payments problem has considerably worsened; it is thus particularly ironic that the SEC's actions in this case have necessitated the return to Greece of a substantial amount of foreign investment in U.S. companies.

[18] *See* Release 25801, 53 Fed. Reg. at 23649. As the SEC there stated, "the use of a U.S. broker-dealer to enter the U.S. securities markets provides protection to the U.S. markets," the only legitimate goal of SEC regulation in the context of such transactions. Here, Euroamerican's use of Tuschner & Co. to "enter the U.S. securities markets" gave the SEC full authority to address any improprieties in connection with such trading which might have potentially affected those markets. The SEC has alleged no such improprieties.

[19] *Id.* In order to deal with a foreign broker, a U.S. broker would normally open one or more securities trading accounts, the usual and customary vehicle in which securities transactions are effected and investors' assets held. In business done on a "omnibus," sometimes called a "pooled," basis, a foreign broker-dealer would open one "omnibus" account with a U.S. broker-dealer, and conduct all business on behalf of all its customers in that account, while remaining responsible for maintaining appropriate records to indicate the extent of each individual customer's holdings in the account. In business done on a "full disclosed" basis, also referred to as an "individual" basis, separate accounts are

Again, the SEC acknowledged that "the U.S. broker-dealer registration requirements were not intended to protect foreign persons dealing with foreign securities professionals outside the United States."[20]

In recent years, the SEC has continued to recognize and react to the ongoing internationalization of the world's securities markets. In 1989, the SEC adopted Exchange Act Rule 15a-6, 17 C.F.R. § 240.15a-6, with the stated purpose of codifying long-standing SEC staff interpretations with respect to foreign broker-dealers whose activities had some connection with United States investors or United States securities markets but who were not subject to regulation as broker-dealers.[21] In Rule 15a-6, the SEC formalized four specific exclusions from the Exchange Act's broker-dealer regulatory provisions for foreign broker-dealers whose activities might have raised questions as to whether they were subject to those provisions. As relevant here, Rule 15a-6(a)(4) formalized the pre-existing SEC interpretation that foreign broker-dealers who effect purchase or sale transactions in securities with a registered broker-dealer are not subject to regulation under U.S. law, whether the registered entity is "acting as principal for its own account or as agent for others."[22]

---

opened in the name of each investor (or discrete group of investors, such as a husband and wife). No further recordkeeping is then needed to track each investor's respective interest, which is a significant advantage of doing business in this form.

The Euroamerican business conducted with Tuschner & Co. was done on a "fully disclosed" basis.

[20] *Id.*, 53 Fed. Reg. at 23649.

[21] *See* Release 27017, 54 Fed. Reg. at 30013.

[22] 17 C.F.R. § 240.15a-6(a)(4). The three other exclusions set forth in Rule 15a-6 apply to foreign broker-dealers who:

(i) effect transactions with United States citizens which "have not been solicited" by the foreign broker-dealers, *see* 17 C.F.R. § 240.15a-6(a)(1);

The SEC repeatedly emphasized that Rule 15a-6 did not represent a new position, but a codification of its prior interpretations of the law. In this regard, the SEC cited prior staff "no-action" letters issued in connection with the situation generally covered by Rule 15a-6(a)(4), noting that the SEC staff had previously "taken no-action positions regarding foreign broker-dealers effecting transactions with or for both registered broker-dealers and banks acting in a broker or dealer capacity as permitted by U.S. statutory and regulatory provisions."[23] Accordingly, the SEC stated, it had "reflected

---

(ii) furnish research reports to "major U.S. institutional investors," and thereafter effect transactions in the securities discussed in such reports with such investors, subject to certain specified limitations, *see* 17 C.F.R. § 240.15a-6(a)(2); and

(iii) induce or attempt to induce transactions with United States "institutional investors" or "major U.S. institutional investors" through a broker-dealer registered under United States law, again subject to specified limitations, *see* 17 C.F.R. § 240.15a-6(a)(3).

One distinction between the three exclusions set forth above, and the fourth exclusion, applicable in this case, is that the first three deal with foreign brokers who sell securities to U.S. investors. In such circumstances, the SEC's jurisdictional claims are much stronger, since the primary purpose of the securities laws is the protection of U.S. investors. The fourth exclusion, applicable in this case, is one that applies to a foreign broker doing business with foreign investors, and dealing with a U.S. broker solely to provide a source of U.S. securities for foreign investors. The SEC would have no legitimate claim that it *could* regulate foreign brokers who engage in such activities, in light of the provisions of Section 30(b) of the Exchange Act. Properly speaking, the fourth exclusion is not an "exemption," as a matter of regulatory discretion, of foreign brokers otherwise subject to the Exchange Act, but a codification of the requirements of the Exchange Act, as well as the SEC's own long-standing recognition that foreign brokers and their personnel selling U.S. securities (obtained through a U.S. broker) to their own nationals were not required to register and be subject to regulation as U.S. broker-dealers.

[23] *See* Release 27017, 54 Fed. Reg. 30030, n.203 and 30019,n.68; Release 25801, 53 Fed. Reg. at 23646, n.10, citing some of the precedents issued by the SEC prior to its enactment of Rule 15a-6. The facts underlying a number of these precedents, *see, e.g., Bear Stearns & Co.,*

this position" in Rule 15a-6(a)(4), the specific provision of the Rule relied upon by Tuschner & Co. in connection with the business it did with Euroamerican and Zahareas.[24]

International Series Rel. No. 85, 43 SEC Docket (CCH) 608 (Jan. 7, 1976), mirror the facts of this case in all essential respects.

[24] It is important to note that if the SEC believed it was necessary to preclude foreign broker personnel who were subject to a bar order, such as Zahareas, from participating in the transactions covered by Rule 15a-6(a)(4), it could have easily so provided in the Rule itself – if it believed it was not precluded from doing so by Section 30(b).

When the SEC wanted to restrict its regulatory exclusions from registration from use by barred individuals, it certainly knew how to do so. Of the four exclusions provided by Rule 15a-6, the SEC provided that only *one* of them, the exclusion applicable to foreign brokers who "induce or attempt to induce transactions" with U.S. institutional investors, Rule 15a-6(a)(3), does *not* extend to a foreign broker who, like Zahareas, is subject to an SEC bar order. (See Rule 15a-6(a)(3)(ii)(B)(1) (exclusion not available unless U.S. registered broker-dealer determines that the foreign broker-dealer is "not subject to a statutory disqualification specified in Section 3(a)(39)" of the Exchange Act; one such "disqualification" is an SEC order barring a person from association with an SEC-registered broker or dealer, *see* 15 U.S.C. § 78c(a)(39)(B)(i)(II).)

The very next provision, Rule 15a-6(a)(4), the one applicable to the facts of this case, *contains no such limitation*, thus making clear that it applies to all foreign brokers and broker personnel, whether such personnel are barred from the U.S. securities industry or not. The SEC gave no reason for not disabling barred individuals from taking advantage of Rule 15a-6(a)(4), as it had done in Rule 15a-6(a)(3). However, a reason that strongly suggests itself is that the SEC recognized that it lacked the authority to require registration, under U.S. law, of barred individuals whose only securities dealings with customers were with foreign customers on foreign territory. That is to say, the SEC was mindful, in enacting Rule 15a-6 in 1989, that the Exchange Act does "not apply to **any person** insofar as he transacts a business in securities outside the jurisdiction of the United States. . . ." 15 U.S.C. §78dd(b) (emphasis added).

III. ZAHAREAS DID NOT BECOME AN "ASSOCIATED PERSON" OF TUSCHNER & CO. BY ENGAGING IN INDEPENDENT ACTIVITIES IN GREECE THAT ARE NOT SUBJECT TO REGULATION UNDER U.S. LAW

In this action, rather than confront the requirements of its Rule 15a-6 directly, the SEC launched a "backdoor" attack, based on nothing more substantial than an overly expansive reading of a definitional provision of the Exchange Act. The term "person associated with a broker or dealer" is defined in Section 3(a)(18) of the Exchange Act, 15 U.S.C. § 78c(a)(18), as

> . . . any partner, officer, director, or branch manager of such broker or dealer (or any person occupying a similar status or performing similar functions), any person directly or indirectly controlling, controlled by, or under common control with such broker or dealer, or any employee of such broker or dealer [other than an employee whose functions are "solely clerical or ministerial"] . . . .

The SEC does not assert that Zahareas ever was or functioned as an official of Tuschner & Co.; its initial argument was, rather, that he was the *equivalent* of, or "similar" to, a Tuschner & Co. "employee" at a "remote location" of Tuschner & Co. Neither this contention, nor its subsequent argument that Zahareas was "controlled" by Tuschner & Co., has merit.

Section 3(a)(18) was enacted in 1964; in including this new definition within the Act, Congress made it clear that its intention was not to extend or, indeed, even modify the scope or reach of the law in any respect, but simply to provide a definition of a term already in use in other provisions of the statute; that is, it was a term defined solely for "convenience of reference." As the legislative history states:

> Section 2, amending Section 3(a) – Definitions.

> . . . Paragraphs 18 and 21 [of Section 3(a) of the Exchange Act] would define the term[s] "person associated with a broker or dealer" . . . for convenience of reference in connection with the provisions for direct disciplinary action against individuals.
>
> The definition in paragraph (18) would include exactly the same classes of persons now referenced to in the fourth paragraph of Section 15(b) under existing law. The statutory change to state expressly that an employee is a type of controlled person is proposed solely to indicate on the face of the statute that this is the fact.[25]

Since the enactment of Section 3(a)(18), the SEC has apparently never – until this case – asserted that, by virtue of transactions effected by a U.S. broker-dealer with an independent foreign broker-dealer, the personnel of the latter became either a *de facto* "employee" or "controlled person," and thereby was "associated" with, the former, and subject to the full panoply of regulatory provisions applicable to

---

[25] Hearings Before a Subcomm. of the Senate Comm. on Banking and Currency, 88th Cong. 1st Sess. at 360-61 (1964); S. Rep. No. 88-379, Report of the Comm. on Banking and Currency to accompany S.1642, 72 (1964). As this legislative history suggests, Section 3(a)(18) included "employees" due to prior disputes between the SEC and the securities industry as to whether actual, *bona fide* "employees" could properly be viewed as "controlled persons," the term previously used in Section 15(b), and thus (and more importantly), whether the broker-dealer could be disciplined as a result of its employee's activities. Congress, at the SEC's request, included "employees" within the new definition and thus ended *that* particular argument. However, there is nothing in the statutory language, or its history, that would indicate that Congress meant the term "employee" to encompass those who are not, in fact, actual employees of an entity but merely engage in contractual, fee-based transactions with that entity. Under the SEC's expansive concept, every time two securities firms do business together, the employees of each firm would potentially be subject to being deemed the "employees" of the other. Congress' intent, on the other hand, was limited; an "employee" is a person "controlled" by an employer, which makes appropriate the disciplining of the employer for the transgressions of the employee.

associated persons of broker-dealers. The cases relied upon by the SEC in the lower courts confirm that, prior to this case, no court has ever sanctioned the interpretation of the law now advanced by the SEC. *SEC v. Telsey*, 1991 WL 72854 (S.D.N.Y. Mar. 13, 1991), and *SEC v. Nappy*, 1993 WL 535401 (N.D. Ill. Dec. 17, 1993), relied upon by the SEC, are both cases brought against individuals who, after being barred by the SEC, continued to effect a securities business *in the United States with United States investors*, while clearly "associating" in various ways with one or more registered brokers.[26] Neither *Telsey* nor *Nappy* support the proposition that a registered broker-dealer who engages, at arms-length, in routine, ordinary-course, securities transactions with an independent foreign broker-dealer who is entirely outside the broker-dealer regulatory provisions of United States law, assumes or acquires either an employer-employee or a "control" relationship.

Congress has given no indication that it intended the term "person associated with a broker or dealer" to be the highly elastic one upon which the SEC's argument depends. Here, the district court accepted the SEC's contention that the term "employee" covers not only a firm's *bona fide* employees, but any other persons who, in connection with any particular transaction, perform some function that *might* have

---

[26] For example, Nappy, while barred, provided funds to start up a U.S.-based broker-dealer's operations, shared the same office and telephone system with the broker-dealer, directed the broker-dealer's operations, shared "trading ideas and strategies" with its personnel and, in effect, controlled and functioned as a *de facto* officer of the broker-dealer. 1993 WL 535401 at *2-3. Telsey, while barred, worked on the premises of four registered broker-dealers, where he was present on a daily basis during business hours, had his own desk and telephone, used a Nasdaq terminal to "make markets in about a score of stocks, trading on behalf of the firm's proprietary account," and held himself out as a "principal" of the firm. 1991 WL 72854 at *1-2. No activities similar to these were cited in the SEC's Complaint herein, even putting to one side the fact that Zahareas conducted his activities in Greece, acting as the principal of what the SEC itself alleges, in its Complaint, was an independent foreign broker-dealer. Complaint ¶ 21 (Zahareas "directed and controlled" Euroamerican).

been performed in-house by an actual employee, *if* the company had intended to perform the function in-house. However, securities firms often deal with each other with respect to the same investor accounts and there is no principled reason they should not be permitted to agree to divide the duties and responsibilities related to handling those accounts as they see fit. When two independent entities agree to deal with one another, and further agree as to how to deal with one another, they have formed only a contractual, not a "control" relationship. That is particularly true where, as here, the contractual relationship may be terminated by either party, at any time, without penalty of any kind. Neither Section 3(a)(18) nor its legislative history contain any hint or suggestion that the SEC, or the courts, by virtue of a new *definition* (and one which Congress said did not change the substantive law), were to be authorized to determine which persons employed by one entity and having some dealings with another entity could be reclassified as statutory "employees" or persons under the "control" of that other entity, for purposes of applying the Exchange Act's broker-dealer regulatory provisions.[27]

---

[27] The SEC's Complaint alleges no *facts* that would support the proposition that, under Minnesota or any other law, Zahareas would be regarded as an "employee" or under the "control" of Tuschner & Co. As the dissent pointed out in the court of appeals:

> The considerations that guide the inquiry into whether control existed include where the right to control the means and manner of performance resided, what the mode of payment was, who furnished relevant materials and tools, who controlled the workplace, and who had the right to discharge. *See, e.g., Guhlke v. Roberts Truck Lines*, 128 N.W.2d 324, 326 (Minn. 1964). The most important of these considerations is who had the right to control the means and manner of performance. *Id.* The evidence before the district court in this case tended to show that Euroamerican operated with separate materials and tools at a separate location in a separate nation that Tuschner & Co.'s leadership had never visited; that neither party had a right to discharge the other, although both had a right to sever their business relationship; and, most important, that Tuschner & Co. had no right to control the means and manner of Euroamerican's

In persuading the district court to do so in *this* case, the SEC's initial argument proceeded upon a misquotation of Section 3(a)(18)'s provisions. Thus, the SEC advised the district court:

> Section 3(a)(18) of the Exchange Act includes within its definition of a "person associated with a broker or dealer" any person *occupying similar status or performing* ***similar functions*** *to an officer, director* ***or employee*** *of a broker or dealer.* Zahareas [is] associated with Tuschner & Co. . . . because he occupies ***a similar status*** *and performs functions* ***similar to those of a Tuschner & Co. employee***, namely a registered representative.[28]

The district court erroneously accepted the SEC's misreading of the statute, holding that "[t]he court agrees with the Commission that Zahareas' actions with respect to the trading in the Greek accounts were *similar to* those of a Tuschner & Co. broker at a remote location." Pet. App. 21a (emphasis added). The court of appeals affirmed, "for the reasons set forth in the district court's opinion," Pet. App. 3a.

The statute is, however, phrased quite differently from the way the SEC would prefer it to read: it states that the term "person associated with a broker-dealer" includes "any partner, officer, director, or branch manager of such broker or dealer (*or any person occupying a similar status or performing similar functions*)." And, it also includes "any employee of such broker or dealer, except that any person associated with a broker or dealer whose functions are solely clerical or ministerial shall not be included in the meaning of such term . . . ." Thus, the key parenthetical phrase containing the word "similar," upon which

---

> and Mr. Zahareas's business. Euroamerican had its own clients before it started working with Tuschner & Co., and was free to advise those clients however it wanted and engage in any business that it wanted with those clients.

Pet. App. 4a.

[28] SEC TRO Memo at 11-12 (emphasis supplied).

the SEC's argument below depended – *i.e.*, "person occupying similar status or performing similar functions" – does not apply at all to the word "employee." And the fact that Congress explicitly made the more expansive, parenthetical phase applicable to a "partner, officer, director and branch manager," while withholding its applicability to an "employee," makes it clear that the term "employee" was **not** intended to embody the endlessly elastic concept advanced by the SEC.[29]

In the court of appeals, the SEC "abandoned" its argument that Zahareas was "similar" to an employee, in favor of one that he was "controlled" by Tuschner & Co. *See* Pet. App. 4a. But the SEC does not make any factual allegations, in its Complaint or elsewhere, to support the contention that Tuschner & Co. either controlled Zahareas, or functioned in any way as his employer. Rather, as the SEC itself alleges, Complaint ¶ 21, Zahareas himself "directed and controlled Euroamerican's business relationship with Tuschner & Co.," and the facts bear this statement out. Before he even met John Tuschner, Zahareas had independently established Euroamerican, Zahareas' own securities brokerage and money management business, in Athens, Greece; Zahareas conducted Euroamerican's

---

[29] There is, of course, good reason why Congress would be more concerned about efforts to camouflage status as an officer of a broker-dealer firm. Otherwise, a barred officer of a broker-dealer might simply divest himself of any formal title and attempt to control the operations of a broker-dealer from outside the firm, using, for example, his power as a controlling stockholder. The same concerns do not arise with respect to persons who are mere "employees;" a person whose only connection with a broker-dealer is that of a *bona fide* employee will always be subject to the "control" of the officers actually in charge of the company, who would remain fully amenable to SEC enforcement action. In both the *Telsey* and *Nappy* cases cited by the SEC (See *supra*, p.24), the courts' real concern was that the barred individual was in *control* of aspects of the broker-dealer's operations. For example, Nappy had provided the necessary funds to start up the operations of the broker-dealer he worked with, and Telsey both controlled the investment of his firm's funds and publicly held himself out as a "principal" of the firm.

operations in Athens, a city that neither John Tuschner nor any other Tuschner & Co. personnel have ever visited;[30] Zahareas employed personnel of his own choosing in conducting his business, most of whom were completely unknown to Tuschner & Co.; Zahareas established and maintained relationships with his own clients, who were Greek investors, some of whom are interested in investing in the U.S. securities market; and Zahareas decided to introduce certain of his clients to Tuschner & Co. because those clients were initially interested in ACT and Tuschner & Co. was the underwriter and, subsequently, a principal market-maker in, and thus a likely source of, ACT securities.

In other words, Zahareas chose to come to Tuschner & Co. *not* because he sought to become an "employee" but because he and his clients wanted to do business, on terms acceptable to Zahareas and his clients and mutually acceptable to Tuschner & Co. Tuschner and Co. and Euroamerican were established and have always been operated independently of each other; there is no allegation to the contrary in the Complaint. Tuschner & Co. has no ability to "control" the decisions made by Zahareas and Euroamerican, or *vice versa*; at any time, the Greek investors, acting pursuant to Zahareas' advice or on their own, could have moved their accounts to another ACT market-maker, or simply decided they were no longer interested in ACT, or the U.S. securities markets, and liquidated their accounts. Zahareas may well influence such decisions by his clients; but there is no SEC allegation in this action, and no evidence, that Tuschner & Co. has any influence on them whatsoever, either directly, or indirectly, through a "control" relationship with Zahareas.

There is, in short, no factual allegation in the SEC's Complaint that would support the conclusion that Zahareas

---

[30] As noted, before John Tuschner met Zahareas, and before Tuschner & Co. became involved with ACT, Euroamerican clients had invested in ACT, prior to its initial public offering. Thus, it could not even be asserted that Tuschner & Co. was initially responsible for requiring Zahareas to ascertain whether Greek investors would be interested in investing in ACT.

was "controlled" by, or an "employee" of, Tuschner & Co. Accordingly, there can be no basis for the holding that he was, under the statutory definition, an "associated person" of Tuschner & Co.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

James H. Schropp
(Counsel of Record)
**FRIED, FRANK, HARRIS,
SHRIVER & JACOBSON**
1001 Pennsylvania Avenue, N.W.
Suite 800
Washington, D.C. 20004
(202) 639-7000

Michael L. Berde
FURBER TIMMER ZAHN, PLLP
One Financial Plaza
Suite 1100
One Twenty South Sixth Street
Minneapolis, Minnesota 55402-1801

Counsel for Petitioners

July 1999

No. 99-____

IN THE

Supreme Court of the United States

TUSCHNER & COMPANY, INC. AND JOHN M. TUSCHNER,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent,

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

CERTIFICATE OF SERVICE

I hereby certify that I caused three true and accurate copies of the Petition for a Writ of Certiorari to be served, on all parties required to be served by messenger (to those counsel located in Washington, D.C.) or by mail, postage prepaid, this 15th day of July, 1999, directed to the following:

Christopher R. Morris, Esq.
BASSFORD, LOCKHART, TRUESDELL & BRIGGS
3550 Multifoods Tower
33 South Sixth Street
Minneapolis, Minnesota 55402
(Counsel for Nicholas Zahareas and Euroamerican Securities, S.A.)

Eric Summergrad, Esq.
Rada Potts, Esq.
SECURITIES AND EXCHANGE COMMISSION
450 Fifth Street, N.W.
Washington, D.C. 20549

Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

James H. Schropp

Appendix A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 98-1524

Securities and Exchange Commission, sued as United States Securities and Exchange Commission,

Appellee,

v.

Nicholas A. Zahareas,

Defendant,

Tuschner & Company, Inc.; John M. Tuschner,

Appellants,

Euroamerican Securities, S.A.,

Defendant.

Appeals from the United States District Court for the District of Minnesota.

[UNPUBLISHED] *

No. 98-1527

Securities and Exchange Commission, sued as United States Securities and Exchange Commission,

Appellee,

v.

Nicholas A. Zahareas,

Appellant,

Tuschner & Company, Inc.; John M. Tuschner,

Defendants,

Euroamerican Securities, S.A.,

Appellant.

Submitted: November 19,1998
Filed: February 9, 1999

Before BEAM, MAGILL, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

PER CURIAM.

Nicholas Zahareas, Euroamerican Securities, S.A., John M. Tuschner, and Tuschner & Co. appeal the district court's[1]

---

[1] The Honorable David S. Doty, United States District Judge for the District of Minnesota.

order granting a preliminary injunction to the Securities and Exchange Commission (SEC) and denying their motions to dismiss for lack of personal and subject-matter jurisdiction. Zahareas is currently subject to a 1993 SEC bar order prohibiting him from associating with a broker or dealer. The preliminary injunction (1) mandates that Zahareas comply with the 1993 bar order and enjoins him from associating with a broker or dealer; (2) enjoins Tuschner & Co. from permitting a person subject to a bar order to become associated with Tuschner & Co.; and (3) enjoins Zahareas, Tuschner and their agents from aiding and abetting any violations of II U.S.C. § 78o(b)(6)(B)(i) and (ii).

After careful review of the record and the parties' briefs, we affirm for the reasons set forth in the district court's opinion. See 8th Cir. R. 47B.

MORRIS SHEPPARD ARNOLD, Circuit Judge, dissenting.

After consenting to a 1993 SEC order that permanently barred him from participation in the securities industry in the United States, Mr. Zahareas established a broker-dealer business called Euroamerican in Athens, Greece. Tuschner & Co., a Minneapolis broker-dealer registered with the SEC, procured American securities for Euroamerican's Greek clients. The SEC commenced this enforcement action claiming that Mr. Zahareas violated the law by associating with a registered broker-dealer, that Tuschner & Co. violated the law by associating with a barred person, and that the parties aided and abetted each other in these violations.

The order entered against Mr. Zahareas did not allow him to "associate with" broker-dealers. Section 3(a)(18) of the Exchange Act, 15 U.S.C. § 78c(a)(18), defines a "person associated with a broker or dealer" or an "associated person" as "any partner, officer, director, or branch manager of such broker or dealer (or any person occupying a similar status or performing similar functions), any person directly or indirectly controlling, controlled by, or under common control with such broker or dealer, or any employee of such broker or dealer." The SEC argued below, and the trial court held, that

the acts performed by Mr. Zahareas and Euroamerican were similar to those performed by an employee, and that Mr. Zahareas was therefore an "associated person" of Tuschner & Co.

The difficulty with this holding, as Defendants point out, is that the parenthetical language relied upon by the SEC and the trial court for this proposition ("for any person occupying a similar status or performing similar functions"), is located directly after the portion of the definition referring to partners, officers, directors, and branch managers. This language does not in any way purport to modify the part of the statute that defines employees, and thus cannot expand the definition of an employee. Therefore only actual employees (and not persons similar to employees) can be "associated persons."

On appeal, the SEC appears to have abandoned its original position in favor of an argument that Mr. Zahareas was an "associated person" because he was under Tuschner & Co.'s control. The parties agree that the issue of control should be decided by basic principles of agency law. The considerations that guide the inquiry into whether control existed include where the right to control the means and manner of performance resided, what the mode of payment was, who furnished relevant materials and tools, who controlled the workplace, and who had the right to discharge. See, e.g., Guhlke v. Roberts Truck Lines, 128 N.W.2d 324, 326 (1964). The most important of these considerations is who had the right to control the means and manner of performance. Id. The evidence before the district court in this case tended to show that Euroamerican operated with separate materials and tools at a separate location in a separate nation that Tuschner & Co.'s leadership had never visited; that neither party had a right to discharge the other, although both had a right to sever their business relationship; and, most important, that Tuschner & Co. had no right to control the means and manner of Euroamerican's and Mr. Zahareas's business. Euroamerican had its own clients before it started working with Tuschner & Co., and was free to advise those

clients however it wanted and engage in any business that it wanted with those clients.

The SEC calls our attention to several facts that it believes support its claim that Mr. Zahareas was an agent of Tuschner & Co., none of which is particularly persuasive to me. The SEC contends that Mr. Zahareas acted in a manner similar to that of a Tuschner & Co. representative, but the activities to which it points were not inconsistent with two separate companies doing business with each other; it points out that Tuschner & Co.'s compliance officer reviewed all orders and documents, but that is only to be expected because Tuschner & Co. was the registered broker-dealer subject to SEC regulation; and it notes that Tuschner & Co. kept Euroamerican's clients when Tuschner & Co. severed its relationship with Euroamerican and Mr. Zahareas, but that could simply be because those clients wished to continue investments in American securities, a service it appeared that Mr. Zahareas could no longer provide. Considering all these facts, it seems clear to me that the SEC has failed to establish that Mr. Zahareas was under Tuschner & Co.'s control.

Although the briefs in this case do not raise the matter, I note that the trial court's findings on the relevant factual issues seem to be self-contradictory. The trial court found both that Mr. Zahareas was an employee of Tuschner & Co. and that he exercised control over Tuschner & Co. Since the core of an employer/employee relationship is control, the court effectively found that Tuschner & Co. and Mr. Zahareas were employees of each other. The two businesses appear to have had some degree of influence over one another, as well as differing degrees of control over the various components of the business deals they executed together, but neither was legally under the control of the other.

On the present state of the record, it appears to me that the district court erred in entering the preliminary injunction. I would therefore reverse the judgment and remand for further proceedings.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

* Note: The Publication Status of this document was changed from Unpublished to Published by Order of the Court dated February 22, 1999.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 98-1524/1527

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellee,

vs.

NICHOLAS ZAHAREAS, et al.
Defendants-Appellants.

Order Denying Petition for Rehearing and for Rehearing En Banc

---

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Dated: April 16, 1999

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Securities & Exchange Commission,

Plaintiff,

V.

Nicholas A. Zahareas, Tuschner & Company, Inc., John M. Tuschner, and Euroamerican Securities S.A.,

Defendants.

Civil No. 97-2859 (DSD/JMM)

ORDER

Jeannete L. Lewis, Esq., Lori A. Trowbridge, Esq., Robert A. Contreras, Esq., Securities & Exchange Commission, 500 Madison Street West, Suite 1400, Chicago, IL 60661-2511, counsel for plaintiff.

Lewis A. Remele, Jr., Esq., Christopher R. Morris, Esq. and Bassford, Lockhart, Truesdell & Briggs, 3550 Multifoods Tower, 33 South Sixth Street, Minneapolis, MN 55402, counsel for defendant Zahareas and Euroamerican Securities.

James H. Schropp, Esq., Fried, Frank, Harris, Shriver & Jacobson, Suite 800, 1001 Pennsylvania Avenue N.W., Washington, D.C. 20004-2505 and Michael L. Berde, Esq., Furber, Timmer & Zahn, 2100 Lincoln Center, 333 South Seventh Street, Minneapolis, MN 55402, counsel for defendant Tuschner & Company and John Tuschner.

This matter is before the court on the motion of plaintiff for a preliminary injunction, the motions of defendants Tuschner & Company, Inc., and John M. Tuschner for leave to file a motion to dismiss in advance of the time specified in Local Rule 7.1. and to dismiss for lack of subject matter jurisdiction, and the motions of defendants Nicholas Zahareas and Euroamerican Securities for leave to file a motion to dismiss in advance of the time specified in Local Rule 7.1 and to dismiss for lack of personal jurisdiction. Based on a review of the file, record, and proceedings herein, the court grants plaintiff's motion for preliminary injunction, grants defendants' motions for leave to file motions to dismiss in advance of the time specified in Local Rule 7.1, and denies defendants' motions to dismiss.

BACKGROUND

Nicholas Zahareas is a United States citizen residing in Athens, Greece. Zahareas is the President and majority shareholder of Euroamerican Securities, S.A. (hereafter "Euroamerican"), a brokerage and financial consulting firm founded in 1996 doing business in Athens, Greece. Tuschner & Company, Inc. (hereafter "Tuschner & Co.") is a broker-dealer located in Minneapolis, Minnesota. John M. Tuschner, a resident of Lakeville, Minnesota, is a registered principal and one of 27 registered representatives of Tuschner & Co. Tuschner is Chairman and Chief Executive Officer of Tuschner & Co. and its parent corporation, Tuschner Financial Group, Inc.

On July 27, 1993, Zahareas was permanently barred from the United States securities industry, including association with registered brokers, dealers, municipal securities dealers, investment advisors, or investment companies, pursuant to an Order Instituting Public Proceedings, Making Findings, and Imposing Remedial Sanctions issued by plaintiff Securities and Exchange Commission (hereafter "Commission").[1] This bar

---

[1] See In the Matter of Nicholas Zahareas, Administrative Proceeding File No. 3-8108, 54 S.E.C. Docket 1342. In addition, on July 16, 1992, Zahareas was permanently enjoined from further violations of the

was based on the Commission's findings that Zahareas willfully violated antifraud provisions of the federal securities laws by executing $1.75 million in unauthorized purchases of securities in the accounts of customers from February 1988 through January 1989 while employed as a registered representative and making misrepresentations to these customers by telling them that the unauthorized securities appearing on their account statements were a result of clerical or computer error. Zahareas consented to the entry of the Order without admitting or denying the Commission's findings.

In March 1996, Tuschner & Co. was serving as the underwriter of the initial public offering of ACT Teleconferencing, Inc. (hereafter "ACT"). The President and Chief Executive officer of ACT introduced Tuschner to Zahareas,[2] who represented Greek clients that had invested in ACT prior to its public offering. Zahareas advised Tuschner that a number of his Greek clients wished to invest in the common stock and warrants being offered in the ACT public offering. Neither at the time of this meeting nor anytime thereafter had Zahareas applied to the Commission for relief from his aforementioned bar from the securities industry nor had he sought the consent of the Commission to associate with Tuschner Co.

Tuschner subsequently learned of Zahareas' bar from the securities industry,[3] and determined that Zahareas could not

---

antifraud provisions of the federal securities laws by the Honorable Donald Alsop, another judge of this court. See S.E.C. v. Nicholas Zahareas. et, al., Civil No. 3-92-431 (D. Minn. 1992).

[2] There seems to be some disagreement as to when this meeting occurred. The Commission asserts this meeting occurred in approximately December 1995. See Affidavit of George J. Miller at ¶ 13. Tuschner claims this meeting occurred in March 1996.

[3] There again seems to be disagreement as to when Tuschner learned of Zahareas' bar. The Commission alleges that Tuschner learned the pertinent information in or about February 1996. Tuschner claims he learned of the bar shortly after he met Zahareas, which occurred, he claims, in March 1996.

be a selected dealer working on the ACT initial public offering. However, the Commission alleges that Tuschner & Company paid Zahareas' wife an 8 percent finder's fee for the ACT shares sold to twelve Greek investors who opened accounts at Tuschner & Co. and purchased ACT shares in the offering.

Subsequent to the closing of the ACT public offering, Zahareas advised Tuschner that other Greek clients of Euroamerican wanted to acquire ACT securities in the secondary market. It was agreed that Euroamerican would be responsible for having its Greek clients complete new account forms with the information necessary for opening accounts at Tuschner & Co. This information was then sent to Tuschner & Co. After a new account was opened for the Greek investor and sufficient funds were deposited, Tuschner & Co. traders executed orders, primarily dealing with ACT securities, pursuant to instructions provided by Euroamerican. From June through August 1997, Tuschner & Co. opened approximately 200 accounts for Greek investors referred by Euroamerican and purchased or sold at least $9,430,000 worth of securities for these accounts. Euroamerican received up to 75 percent of all revenues generated from trades in the Greek accounts as a "foreign finders fee," and only Euroamerican and Zahareas were paid a commission for the trades in the Greek accounts. Affidavit of George J. Miller at ¶¶ 15 and 24.

The Commission alleges that Tuschner & Co.'s agreement with Euroamerican was really an agreement with Zahareas. The Commission alleges that it was Zahareas who referred Greek customers to Tuschner & Co., completed all the necessary information, and contacted the Tuschner & Co. trader to direct what securities to purchase and sell through the Greek accounts and what commissions to charge the Greek customers for those trades. In essence, the Commission contends Zahareas' actions with respect to the trading in these accounts were similar to those of a Tuschner & Co. broker at a remote location. Zahareas purportedly requested and received internal reports from Tuschner & Co. concerning the

Greek accounts, and served as the only means by which Tuschner & Co. had contact with its Greek customers.

In August 1997, the Commission initiated an investigation focusing on the activities of Euroamerican and Zahareas, and this investigation included Tuschner & Co. as a result of that company's involvement with Euroamerican. On September 3, 1997, Tuschner sent Zahareas a letter stating that

> [p]ending resolution of issues raised in ongoing SEC inquiries, it appears appropriate for our firms to cease doing business with one another. I request that you contact me on receipt of this message so that we can begin making the necessary arrangements to transfer the accounts which we now maintain with Greek clients referred to us by you to an alternative Greek broker-dealer or investment advisor firm.

Letter from John M. Tuschner to Nick Zahareas, Exhibit G to Affidavit of George J. Miller. Tuschner and Tuschner & Co. claim that since September 1997, discussions have occurred regarding new arrangements for the Greek accounts, and several firms, including Nunox Securities (hereafter "Nunox") are being considered as successors to Euroamerican.

The Commission, on the other hand, alleges that after September 1997, one of Tuschner & Co.'s traders discussed with Zahareas a cross-trade between two of the Greek customers, Zahareas regularly received Tuschner & Co. Money Line Reports, and Tuschner & Co. received approximately 20-25 new account forms from Greek customers. Tuschner & Co. claims it began the process of transferring the Greek accounts to Nunox, and authorized Tuschner & Co.'s dealers to accept orders involving the Greek customers' accounts from one Katerina Scordu, who approached Tuschner after Zahareas received the September 3, 1997, letter and indicated that she was associated with Nunox. Scordu has placed orders on Greek customer accounts through Tuschner & Co.'s trader. Scordu's telephone number

in Greece, however, is alleged to be the same as the number used to reach Zahareas.[4] The Commission alleges that as of December 4, 1997, Tuschner & Co.'s Greek customers had not transferred their accounts to another brokerage firm, nor had Tuschner & Co. contacted them about terminating their relationship with Zahareas or Euroamerican. Nunox and Scordu, argue the Commission, are simply an attempt to camouflage Zahareas' continued association with Tuschner & Co.

The Commission filed its complaint in this matter on December 19, 1997. The Commission seeks injunctive relief against Zahareas pursuant to 15 U.S.C. § 78u(e) for violations of the July 27, 1993, Commission Order, and against Zahareas, Tuschner, and Tuschner & Co. pursuant to 15 U.S.C. § 78u(d) for violations and aiding and abetting violations of the federal securities laws in violation of §§ 15(b)(6)(B)(i) and (ii) of the Securities Exchange Act of 1934 (hereafter "Exchange Act"), 15 U.S.C. § 78o(b)(6)(B)(i) and (ii). On December 19, 1997, defendants consented to, and this court issued, a temporary restraining order commanding Zahareas to comply with the July 27, 1993, order of the Commission prohibiting Zahareas from associating with any broker or dealer, and prohibiting Tuschner and Tuschner & Co. from associating or aiding and abetting others' association with Zahareas. The Commission's motion for preliminary injunction is now before the court. Defendants Tuschner and Tuschner & Co. have responded by filing a motion to dismiss for lack of subject matter jurisdiction and defendants Zahareas and Euroamerican have responded by filing a motion to dismiss for lack of personal jurisdiction.

---

[4] It is not entirely clear to the court whether the Commission alleges that Zahareas and Scordu shared the same number or if Euroamerican and Nunox shared the same number.

DISCUSSION

Local Rule 7.1(b)(2) provides that dispositive motions, including motions for injunctive relief, are to be filed only after such motion is fully briefed by all parties pursuant to the time limitations set forth in Local Rule 7.1(b)(1) Defendants have moved for leave to file motions to dismiss in advance of the time specified by these Local Rules. The court agrees with defendants that considerations of fairness and due process, and concern over the efficient use of the court's resources, call for the concurrent hearing of all the issues raised by the plaintiff's request for injunctive relief. The court therefore grants defendants' motions for leave to file motions to dismiss out of time, and will address these issues prior to examining the Commission's request for a preliminary injunction.

a. Subject Matter Jurisdiction

The Commission brings this action pursuant to §§ 27 and 21(e) of the Exchange Act, 15 U.S.C. §§ 78aa and 78u(e). The former provision provides that

> [t] he district courts of the United States . . . shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity ... brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder.

15 U.S.C. § 78aa. The latter provision, as detailed below, allows this court to issue injunctive relief mandating adherence to Commission orders. The court has jurisdiction over transnational securities cases where some activity involving a violation of the Exchange Act occurred in this country. Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc., 592 F.2d 409, 415 (8th Cir. 1979) (citing S.E.C. v. Kasser, 548 F.2d 109, 114 (3d Cir. 1977), cert. denied, 431 U. S. 938 (1977)). As long as sufficient contact with the United States exists, the Commission need not show economic harm as a result of the illegal activity. Continental Grain, 592 F.2d at 409 ("[J]urisdiction may be established by meeting the requirements of either, not both, the conduct or

effects test."); Travis v. Anthes Imperial Limited, 473 F.2d 515, 524 (8th Cir. 1973) ("In our view, subject matter jurisdiction attaches whenever there has been significant conduct with respect to the alleged violations in the United States.").

The court concludes that sufficient activity of the defendants alleged by the Commission to be in violation of the Exchange Act and prior Commission bar order occurred in this country. Zahareas, Tuschner, and Tuschner & Co. employees corresponded on a frequent basis through letters, phone calls, and facsimiles. Although Zahareas was in Greece at the time, this activity is considered to have been carried out in this country. See Continental Grain, 592 F.2d at 421 n.18 ("Both the place of sending and the place of receipt constitute locations in which conduct takes place when the mails or instrumentalities of interstate commerce are used to transmit communications."); Travis, 473 F.2d at 524 n.16 (same). Zahareas also met in person with Tuschner in June 1997 in Minnesota to discuss the business relationship that is the subject of this action. Further, the Greek customer accounts are located in Minnesota and the trading that took place in these accounts occurred through a Minnesota brokerage on a United States exchange. The conduct occurring in this country is material to the allegations brought by the Commission, and there is a sufficient basis for the court to exercise subject matter jurisdiction.

b. Personal Jurisdiction

Zahareas and Euroamerican move for dismissal of this action for lack of personal jurisdiction pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure.[5] The Commission carries the burden of establishing a prima facie showing that the court has personal jurisdiction over Zahareas. Digi-Tel Holdings,

---

[5] Zahareas also joins with Tuschner in arguing the court does not have subject matter jurisdiction. As already discussed, the court has subject matter jurisdiction to hear this case.

Inc. v. Proteg Telecommunications (PTE), Ltd., 89 F.3d 519, 522 (8th Cir. 1996). When considering a Rule 12(b)(2) motion, the court must view the evidence in favor of the Commission and resolve all factual conflicts in the Commission's favor. Id.; Watlow Elec. Mfg. Co. v. Patch Rubber Co., 838 F.2d 999, 1000 (8th Cir. 1988).

A federal court may assume jurisdiction over nonresident defendants only to the extent permitted by the long-arm statute of the forum state and by constitutional due process. Wessels, Arnold & Henderson v. National Medical Waste, Inc., 65 F.3d 1427, 1431 (8th Cir. 1995) ; Dakota Industries, Inc. v. Dakota Sportswear, Inc., 946 F.2d 1384, 1389 n.2 (8th Cir. 1991) (applying standard of International Shoe and its progeny to question of personal jurisdiction in a federal question case) Minnesota state courts have held that the Minnesota Legislature intended the state's long-arm statute to have the maximum extraterritorial effect allowed under the Constitution; thus, the court must consider whether the assertion of jurisdiction over Zahareas and Euroamerican is consistent with due process. Minnesota Min. & Mfg. Co. v. Nippon Carbide Industries Co., Inc., 63 F.3d 694, 697 (8th Cir. 1995), cert. denied, 116 S. Ct. 1288 (1966) (citing Domtar, Inc., v. Niagara Fire Ins. Co., 518 N.W.2d 58, 60-61 (Minn. Ct. App. 1994), affd., 533 N.W.2d 25 (Minn. 1995), cert. denied, 116 S. Ct. 583 (1995)).

Due process is satisfied when non-resident defendants have "minimum contacts" with the forum state "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" International Shoe, Co. v. State of Wash., Office of Unemployment Compensation and Placement, 326 U.S. 310, 316 (1945). The requisite minimum contacts must be based on acts of the defendant. Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County, 480 U.S. 102 (1987). Whether the minimum contacts are sufficient to satisfy due process depends upon whether the defendant has "'purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws."' Burger King Corp.

v. Rudzewicz, 471 U.S. 462, 475 (1985) (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)). "Purposeful availment" means deliberately engaging in significant activities within a state or creating *"continuing obligations"* between the litigant and residents of the forum. Burger King, 471 U.S. at 475-76. A defendant must have "fair warning that a particular activity may subject (it] to the jurisdiction of a foreign sovereign." Shaffer v. Heitner, 433 U.S. 186, 218 (1977) (Stevens, J. concurring). Minimum contacts need not include physical presence, but the contacts must be more than "random," "fortuitous, or "attenuated." Bell Paper Box, Inc. v. Trans Western Polymers, Inc., 53 F.3d 920, 922 (8th Cir. 1.995) (citing Burger King, 471 U.S. at 475) In other words, minimum contacts with the forum state are sufficient if the nonresident defendant "'should reasonably anticipate being haled into court there. Northrup King Co. v. Compania Productora Semillas Alcrodonera Selectas, S.A., 51 F.3d 1383, 1387 (8th Cir. 1995) (citing World-Wide Volkswagen Co. v. Woodson, 444 U.S. 286, 291 (1980)).

The court, in determining the sufficiency of defendant's contacts, considers several factors: (1) the quantity of contacts with the forum state; (2) the nature and quality of contacts; (3) the relation of the cause of action to the contacts; (4) the interest of the forum state in providing a forum for its residents; and (5) the convenience or inconvenience to the parties. Bell Paper Box, Inc. v. U.S. Kids, Inc., 22 F.3d 816, 819 (8th Cir. 1994); Sybaritic, Inc. v. Interport Intern., Inc., 957 F.2d 522, 524 (8th Cir. 1992) (explaining that the analytical framework incorporates the notions of both "minimum contacts" and "fair play and substantial justice"). The first three considerations are primary factors, whereas the latter two considerations are secondary factors in the inquiry. Northrup King, 51 F.3d at 1388. The third factor has been further discussed by the courts as distinguishing between specific and general jurisdiction. "'Specific jurisdiction refers to jurisdiction over causes of action arising from or related to a defendant's actions within the forum state while general jurisdiction refers to the power of a state to adjudicate any cause of action involving a particular defendant, regardless of

where the cause of action arose.'" Burlington Industries, Inc. v. Maples Industries Inc., 97 F.3d 1100, 1102 (8th Cir. 1996) (quoting Bell Paper Box, 22 F.3d at 819) Because the first three factors are interrelated, the court will consider those factors together.

The evidence is clear that Zahareas, while in Greece, has directed numerous and frequent communications to Tuschner and Tuschner & Co. in Minnesota. These communications include writings, facsimiles, and phone calls, and all concern the Greek accounts. Evidence exists showing Zahareas directed trading in these accounts, which are located in Minnesota, and that the trades were executed in this state as well. More important, Zahareas met with Tuschner while visiting Minnesota in June 1997 to discuss arrangements relating to the Greek accounts and the agreement between Euroamerican and Tuschner & Co. Tuschner admits that during this meeting he discussed with Zahareas the fee arrangements with Euroamerican and the corresponding duties of Euroamerican and Tuschner & Co. September 5, 1997, Testimony of John Tuschner at 142.

Zahareas' contacts with Minnesota go beyond his dealings with Tuschner & Co. Tuschner testified that Zahareas has an ex-wife and child in this state, and a purpose of Zahareas' June 1997 visit was attending his daughter's graduation from high school. Id. at 141. However, the number of letters, facsimiles and phone calls directed by Zahareas toward Tuschner & Co. in Minnesota, directing action on the Greek accounts located in this state, when combined with his presence here on related matters, is more than sufficient to establish minimum contacts with this state. These contacts are part of a pattern of communication directly related to this cause of action, and are not random or fortuitous. The court can conclude that Zahareas purposefully availed himself of the privilege of conducting activities within Minnesota, and that he could reasonably anticipate being haled into court here. The exercise of personal jurisdiction over Zahareas is therefore warranted.

Zahareas points out that he resides and conducts business in Athens, Greece and Euroamerican is a Greek brokerage firm with no offices in Minnesota. Thus, Zahareas argues that the Commission has failed to establish minimum contacts, as "'letters, facsimiles, and telephone conversations alone do not establish personal jurisdiction.'" Mem. of Zahareas and Euroamerican in Supp. of Mot. to Dismiss (Docket No. 26) at 4 (citing Red Wing Shoe Co., Inc. v. Hockerson-Halberstadt, Inc., 966 F. Supp. 833, 837 (D. Minn. 1997)). However, Zahareas' facsimiles and telephone conversations were more than simple correspondence; through these means Zahareas directed the Minnesota-based trading of accounts located in this state. Moreover, Zahareas also met personally with Tuschner, in Minnesota, to discuss their business relationship. There is thus no basis for Zahareas to claim that his business activities and those of Euroamerican were conducted wholly outside Minnesota and the United States.

c. Preliminary Injunction

The Commission seeks a preliminary injunction against Zahareas pursuant to § 21(e) of the Exchange Act, 15 U.S.C. § 78u(e), for violations of the July 27, 1993 Commission bar order, and against Zahareas, Tuschner, and Tuschner & Co. pursuant to § 21(d) of the Exchange Act, 15 U.S.C. § 78u(d), for violations and aiding and abetting violations of §§ 15(b)(6)(B)(i) - (ii) of the Exchange Act. To obtain such equitable relief, the Commission must show that defendants violated the law and there is a reasonable likelihood of further violations in the future.[6] S.E.C. v. Comserv Corp., 908 F.2d 1407, 1412 (8th Cir. 1990) (citing S.E.C. v. Commonwealth Chemical Securities Inc., 574 F.2d 90, 99 (2nd Cir. 1978)). See also S.E.C. v. Gruenberg, 989 F.2d 977, 978 (8th Cir. 1993) (a permanent injunction requires the S.E.C. to prove that the defendant violated the law and that there is a reasonable likelihood of future violations).

---

[6] As the Commission points out, the standard utilized under § 21(d) of the Exchange Act is also used in cases involving § 21(e). See, e.g., S.E.C. v. Stratton Oakmont, Inc., 1994 WL 721502 (D.D.C. Dec. 19, 1994).

The court notes that this is a significantly different and easier test than the standard utilized in this Circuit in cases involving private litigants under Dataphase Systems, Inc. v. C L Systems, Inc., 640 F.2d 109, 114 (8th Cir. 1981) (en banc).[7] However, as in a case involving private litigants, a preliminary injunction will issue only "where it appears that the petitioner is likely to succeed on the merits in proving that a permanent injunction is warranted." In re Y & A Group Securities Litigation, 38 F.3d 380, 383 (8th Cir. 1994).

---

[7] Under Dataphase, the court asks four questions in determining if a preliminary injunction is warranted:

> 1. Is there a substantial threat that the movant will suffer irreparable harm if relief is not granted;
>
> 2. Does the irreparable harm to movant outweigh any potential harm that *granting a* preliminary injunction may cause the nonmoving parties;
>
> 3. Is there a substantial probability that the movant will prevail on the merits; and
>
> 4. The public interest.

1. Compliance with the Bar Order

Upon application by the Commission, this court may issue an injunction commanding any person to comply with the Commission's administrative orders. 15 U.S.C. § 78u(e). As previously detailed, Zahareas was barred from the United States securities industry, including association with any broker or dealer, in July 1993. The Commission now alleges that since at least June 1996 Zahareas has violated this bar order by associating with Tuschner & Co., a registered broker-dealer. The Commission alleges that through his actions Zahareas has essentially become an employee of Tuschner & Co. The Commission seeks an injunction to prevent further violations by Zahareas of the bar order.

The Exchange Act provides that

> [t]he term "person associated with a broker or dealer" or "associated person of a broker or dealer" means any partner, officer, director, or branch manager of such broker or dealer (or any person occupying a similar status or performing similar functions), any person directly or indirectly controlling, controlled by, or under common control with such broker or dealer, or any employee of such broker or dealer[.]

15 U.S.C. § 78c(a)(18). In this case, the Commission alleges that under the terms of their oral agreement, "Zahareas became employed by Tuschner & Co. when he undertook to act as its agent by assuming all of the responsibilities of a register representative for Tuschner & Co.'s Greek accounts in return for a portion of commissions generated on those accounts." Mem. In Supp. of Pl.'s Mot. for a Prelim. Inj. And Other Equitable Relief (Docket No. 29) at 22.

After reviewing the record, the court concludes that Zahareas served as an agent of Tuschner & Co. by orchestrating Tuschner & Co.'s trading in the Greek accounts. Zahareas referred the Greek customers to Tuschner & Co., completed all the necessary information for opening the accounts, and once opened contacted the Tuschner & Co.

trader to direct what securities to purchase and sell in the accounts and what commissions to charge the Greek customers for those trades. Zahareas appears to have directed the purchase and sale of approximately $9,430,000 worth of securities in over 200 accounts. The Greek customers were customers of Tuschner & Co., as evidenced by the letters and monthly statements sent to these customers bearing the Tuschner & Co. letterhead or logo. There is no evidence of a relationship between these customers and Euroamerican.

The court agrees with the Commission that Zahareas' actions with respect to the trading in the Greek accounts were similar to those of a Tuschner & Co. broker at a remote location. Zahareas purportedly requested and received internal reports from Tuschner & Co. concerning the Greek accounts, and served as the only means through which Tuschner & Co. had contact with its Greek customers. This evidence is sufficient to support a finding that Tuschner & Co. not only used Zahareas as an agent in transacting business with its Greek customers, but that Zahareas exerted control over Tuschner & Co. with regard to the handling of the Greek accounts. The court therefore concludes that Zahareas associated with a broker-dealer in violation of the bar order.

Further, there is ample evidence that absent an injunction Zahareas will continue to flout the bar order. Even after Tuschner informed Zahareas in September 1997 that due to the Commission investigation their relationship must cease, one of Tuschner & Co.'s traders discussed with Zahareas a cross-trade between two of the Greek customers, Zahareas regularly received Tuschner & Co. Money Line Reports, and Tuschner & Co. received approximately 20-25 new account forms from Greek customers. While Tuschner purportedly began the process of transferring the Greek accounts and authorized Tuschner & Co.'s dealers to accept orders on the Greek accounts from Scordu, there is evidence that Zahareas is simply using Nunox and Scordu to hide his continued involvement. Scordu's telephone number in Greece, is alleged to be the same as the number used to reach Zahareas. As of December 4, 1997, Tuschner & Co.'s Greek customers had

not transferred their accounts from Euroamerican to Nunox or any other another brokerage firm, nor had Tuschner & Co. contacted them about terminating their relationship with Zahareas or Euroamerican. In light of this evidence, a preliminary injunction ordering compliance with the bar order is necessary.

2. Substantive Violations of the Exchange Act

The plaintiff also seeks an injunction against Zahareas pursuant to 15 U.S.C. § 78u(d)(1) which provides in relevant part that

> [w]henever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation of (the Exchange Act or other regulations], it may in its discretion bring an action in the proper district court of the United States . . . to enjoin such acts or practices, and upon a proper showing a . . . preliminary injunction . . . shall be granted without bond.

The Commission alleges that (1) Zahareas violated § 15(b)(6)(b)(i) of the Exchange Act by associating with Tuschner & Co. under the definition in § 3(a)(18) of the Exchange Act by acting as a Tuschner & Co. registered representative; (2) Tuschner & Co. violated § 15(b)(6)(B)(ii) of the Exchange Act by allowing a barred individual from associating with it without the Commission's consent; (3) Tuschner aided and abetted Zahareas' violation of § 15(b)(6)(B)(i) and Tuschner & Co.'s violation of § 15(b)(6)(B)(ii) by allowing and facilitating Zahareas, association with Tuschner & Co. and (4) Zahareas aided and abetted Tuschner & Co.'s violation of § 15(b)(6)(B)(ii) by bringing new accounts to Tuschner & Co. and conducting trading in these accounts. The court will briefly address each allegation of past violations before turning to the likelihood of future violations.

a. Zahareas' Alleged Violation of § 15(b)(6)(B)(i)

The Exchange Act prohibits any person subject to an order barring that person from association with a broker or dealer "willfully to become, or to be, associated with a broker or dealer in contravention of such order" without the consent of the Commission. 15 U.S.C. § 78o(b)(6)(B)(i). As has already been discussed in conjunction with Zahareas' alleged violation of the bar order, there is ample evidence that Zahareas was associated with Tuschner & Co. under the definition of § 3(a)(18) of the Exchange Act, and that this association occurred without the prior consent of the Commission.

b. Tuschner & Co.'s Alleged Violation of § 15(b)(6)(B)(ii)

The Exchange Act further prohibits "any broker or dealer to permit [a barred individual], without the consent of the Commission, to become or remain, a person associated with the broker or dealer in contravention of [a bar order], if such broker or dealer knew, or in the exercise of reasonable care should have known, of such order." 15 U.S.C. § 78o(b)(6)(B)(ii). Tuschner first became aware of the bar order in February or March 1996, and this knowledge is attributable to Tuschner & Co. Despite this knowledge, Tuschner & Co., as already described, allowed Zahareas to associate with the firm without the Commission's consent.

c. Tuschner's Alleged Aiding and Abetting

The Exchange Act also provides for aiding and abetting liability, dictating that "any person that knowingly provides substantial assistance to another person in violation of a provision of [the Exchange Act or its accompanying rules and regulations], shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided." 15 U.S.C. § 78t(f) Tuschner in this case participated in the negotiations between Tuschner & Co. and Zahareas, leading to an agreement through which over 200 Greek customers opened accounts at Tuschner & Co. and Zahareas directed all related trading. The Commission is

correct in arguing that without Tuschner's permission and assistance Zahareas would not have been able to associate with Tuschner & Co. in violation of the bar order. Tuschner appears to be the one who authorized Tuschner & Co.'s trader to accept orders from Zahareas related to the Greek accounts and facilitated Zahareas' actions. There is thus ample evidence that Tuschner aided and abetted the actions of both Zahareas and Tuschner & Co.

d. Zahareas' Alleged Aiding and Abetting

There is also evidence that Zahareas substantially assisted Tuschner & Co.'s violation of § 15(b)(6)(B)(ii) of the Exchange Act. Zahareas was responsible for referring over 200 new Greek clients to Tuschner & Co., completing all required new account information, and directing trading in these accounts once opened. In all but name, Tuschner acted as the registered representative for these accounts, thus aiding and abetting violations by Tuschner & Co.

Having established that past violations of the Exchange Act occurred, the Commission need only show a reasonable likelihood that defendants will further violate or aid and abet others' violations of §§ 15(b)(6)(B)(i) and (ii) of the Exchange Act in the future. The evidence shows that after the initiation of the Commission's investigation in this case, the defendants may have attempted to disguise Zahareas' continued association with Tuschner & Co. by utilizing Scordu and Nunox in the place of Zahareas and Euroamerican to service the Greek accounts. The fact that Scordu and Zahareas have the same phone number gives rise to an inference that Zahareas is still involved. Given the fact that the Greek customers still maintain significant positions in U.S. securities, it is reasonable to believe that Zahareas will attempt to continue to act on their behalf. In addition, Tuschner & Co.'s Greek customers have not transferred their accounts to another brokerage firm, nor has Tuschner & Co. contacted them about terminating their relationship with Zahareas or Euroamerican. This evidence all leads to the conclusion that, in the absence of a preliminary injunction, further violations of the Exchange Act will occur. See S.E.C.

v. Washington County Utility District 676 F.2d 218, 227 (6th Cir. 1982) ("Proof of past violations of the securities laws serves as a basis for an inference that future violations may occur.") Therefore, the Commission has alleged sufficient facts, given the special standard the court must apply in this case, to warrant the requested injunctive relief.

CONCLUSION

Based on a review of the file, record, and proceedings herein, the court concludes that it has both subject matter jurisdiction over this action and personal jurisdiction over the defendants. In addition, the Commission has satisfied its burden and a preliminary injunction is appropriate. Therefore, **IT IS HEREBY ORDERED** that:

1. Defendants Tuschner & Co. and John M. Tuschner's and Nicholas Zahareas and Euroamerican's motions for leave to file motions to dismiss in advance of the time specified by Local Rule 7.1(b) are granted;

2. Defendants Tuschner & Co. and John M. Tuschner's motion to dismiss for lack of subject matter jurisdiction is denied;

3. Defendants Nicholas Zahareas and Euroamerican's motion to dismiss for lack of personal jurisdiction is denied;

4. Plaintiff' s motion for preliminary injunction *is* granted. Pursuant to § 21(e) of the Exchange Act, 15 U.S.C. § 78u(e), Zahareas is preliminarily mandated, enjoined and commanded to comply with the order of the Commission issued on July 27, 1993, barring him from association with any broker, dealer, investment advisor, investment company, or municipal securities dealer. Further, Zahareas, his agents, servants, employees, attorneys, and those persons in active concert or participation with him who receive actual notice of this order by personal service or otherwise are preliminarily restrained and enjoined from, directly or indirectly, violating § 15(b)(6)(B)(i) of the Exchange Act, 15 U.S.C. § 78o(b)(6)(B)(i), by becoming a broker or dealer or by associating with any broker or dealer without the consent of

the Commission. Tuschner & Co., its agents, servants, employees, attorneys, and those persons in active concert or participation with it who receive actual notice of this order by personal service or otherwise are preliminarily restrained and enjoined from, directly or indirectly, violating § 15(b)(6)(B)(ii) of the Exchange Act, 15 U.S.C. § 80o(b)(6)(B)(ii), by permitting, without the consent of the Commission, a person who has been barred from association with a broker or dealer to become or remain a person associated with the broker or dealer in contravention of this order. Finally, Zahareas, Tuschner, and their agents, servants, employees, attorneys, and those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, are hereby preliminarily restrained and enjoined from, directly or indirectly, aiding and abetting any violation of §§ 15(b)(6)(B)(i) and (ii) of the Exchange Act, 15 U.S.C. §§ 78o(b)(6)(B)(i) and (ii), by permitting, without the consent of the Commission, a person who has been barred from association with a broker or dealer to become or remain a person associated with the broker or dealer in contravention of this order.

Dated: January 28, 1998

/s/

David S. Doty, Judge
United States District Court

Appendix C

STATUTORY AND REGULATORY AUTHORITIES

THE SECURITIES EXCHANGE ACT OF 1934, 15 U.S.C. § 78A, ET SEQ.

Sec. 3, Definitions and application of title

Sec. 3(a) When used in this title, unless the context otherwise requires--

* * *

(4) The term "broker" means any person engaged in the business of effecting transactions in securities for the account of others, but does not include a bank.

(5) The term "dealer" means any person engaged in the business of buying and selling securities for his own account, through a broker or otherwise, but does not include a bank, or any person insofar as he buys or sells securities for his own account, either individually or in some fiduciary capacity, but not as a part of a regular business.

* * *

(18) The term "person associated with a broker or dealer" or "associated person of a broker or dealer" means any partner, officer, director, or branch manager of such broker or dealer (or any person occupying a similar status or performing similar functions), any person directly or indirectly controlling, controlled by, or under common control with such broker or dealer, or any employee of such broker or dealer, except that any person associated with a broker or dealer whose functions are solely clerical or ministerial shall not be included in the meaning of such term for purposes of section 15(b) of this title (other than paragraph (6) thereof).

* * *

(39) A person is subject to a "statutory disqualification" with respect to membership or participation in, or association with a member of, a self-regulatory organization, if such person--

(B) is subject to--

(i) an order to the Commission, other appropriate regulatory agency, or foreign financial regulatory authority--

(I) denying, suspending for a period not exceeding 12 months, or revoking his registration as a broker, dealer, municipal securities dealer, government securities broker, or government securities dealer or limiting his activities as a foreign person performing a function substantially equivalent to any of the above; or

(II) barring or suspending for a period not exceeding 12 months his being associated with a broker, dealer, municipal securities dealer, government securities broker, government securities dealer, or foreign person performing a function substantially equivalent to any of the above . . . .

* * *

Sec. 7(f)(2)(A)

* * *

(A) The term "United States person" includes a person which is organized or exists under the laws of any State or, in the case of a natural person, a citizen or resident of the United States; a domestic estate; or a trust in which one or more of the foregoing persons has a cumulative direct or indirect beneficial interest in excess of 50 per centum of the value of the trust.

* * *

Sec. 15, Registration and regulation of brokers and dealers

Sec. 15(a)

(1) It shall be unlawful for any broker or dealer which is either a person other than a natural person or a natural person not associated with a broker or dealer which is a person other than a natural person (other than such a broker or dealer whose business is exclusively intrastate and who does not make use of any facility of a national securities exchange) to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) unless such broker or dealer is registered in accordance with subsection (b) of this section.

* * *

Sec. 15(b)

(4) The Commission, by order, shall censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding twelve months, or revoke the registration of any broker or dealer if it finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or revocation is in the public interest and that such broker or dealer, whether prior or subsequent to becoming such, or any person associated with such broker or dealer, whether prior or subsequent to becoming so associated--

* * *

(C) is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from acting as an investment adviser, underwriter, broker, dealer, municipal securities dealer, government securities broker, government securities dealer, transfer agent, foreign person performing a function substantially equivalent to any

of the above, or entity or person required to be registered with the Commodity Exchange Act or any substantially equivalent foreign statute or regulation, or as an affiliated person or employee of any investment company, bank, insurance company, foreign entity substantially equivalent to any of the above, or entity or person required to be registered under the Commodity Exchange Act or any substantially equivalent foreign statute or regulation, or from engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security.

* * *

(G) has been found a foreign financial regulatory authority to have--

(i) made or caused to made in any application for registration or report required to be filed with a foreign financial regulatory authority, or in any proceeding before a foreign financial regulatory authority with respect to registration, any statement that was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, or has omitted to state in any application or report to the foreign financial regulatory authority any material fact that is required to be stated therein;

(ii) violated any foreign statute or regulation regarding transactions in securities, or contracts of sale of a commodity for future delivery, traded on or subject to the rules of a contract market or any board of trade;

(iii) aided, abetted, counseled, commanded, induced, or procured the violation by any person of any provision of any statutory provisions enacted by a foreign government, or rules or regulations thereunder, empowering a foreign financial regulatory authority regarding transactions in securities, or contracts of sale of a commodity for future delivery, traded on or subject to the rules of a contract market or any board of trade, or has been found, by a foreign financial regulatory

authority, to have failed reasonably to supervise, with a view to preventing violations of such statutory provisions, rules, and regulations, another person who commits such a violation, if such other person is subject to his supervision.

* * *

Sec. 15(b)

(6)(B) It shall be unlawful--

(i) for any person as to whom an order under subparagraph (A) is in effect, without the consent of the Commission, willfully to become, or to be, associated with a broker or dealer in contravention of such order, or to participate in an offering of penny stock in contravention of such order;

(ii) for any broker or dealer to permit such a person, without the consent of the Commission, to become or remain, a person associated with the broker or dealer in contravention of such order, if such broker or dealer knew, or in the exercise of reasonable care should have known, of such order . . . .

* * *

Sec. 23, Rules, regulations and orders

Sec. 23(a)

(1) The Commission, the Board of Governors of the Federal Reserve System, and the other agencies enumerated in section 3(a)(34) of this title shall each have power to make such rules and regulations as may be necessary or appropriate to implement the provisions of this title for which they are responsible or for the execution of the functions vested in them by this title, and may for such purposes classify persons, securities, transactions, statements, applications, reports, and other matters within their respective jurisdictions, and prescribe greater, lesser, or different requirements for different classes thereof. No provision of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with a rule, regulation, or order of the

Commission, the Board of Governors of the Federal Reserve System, other agency enumerated in section 3(a)(34) of this title, or any self-regulatory organization, notwithstanding that such rule, regulation, or order may thereafter be amended or rescinded or determined by judicial or other authority to be invalid for any reason.

* * *

Sec. 30

Sec. 30(b) The provisions of this title or of any rule or regulation thereunder shall not apply to any person in so far as he transacts a business in securities without the jurisdiction of the United States, unless he transacts such business in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate to prevent the evasion of this title.

Rule 15a-6 under the Securities Exchange Act of 1934, 17 C.F.R. § 240.15a-6

[Exemption of Certain Foreign Brokers or Dealers]

Reg. §240.15a-6. (a) A foreign broker or dealer shall be exempt from the registration requirements of sections 15(a)(1) or 15B(a)(1) of the Act to the extent that the foreign broker or dealer:

(1) effects transactions in securities with or for persons that have not been solicited by the foreign broker or dealer; or

(2) furnishes research reports to major U.S. institutional investors, and effects transactions in the securities discussed in the research reports with or for those major U.S. institutional investors. . . .

* * *

(3) induces or attempts to induce the purchase or sale of any security by a U.S. institutional investors or a major U.S. institutional investor; provided that . . . .

* * *

(ii) the foreign associated person of the foreign broker or dealer effecting transactions with the U.S. institutional investor or the major U.S. institutional investor:

* * *

(B) is determined by the registered broker or dealer to:

(I) not be subject to a statutory disqualification specified in section 3(a)(39) of the Act, or any substantially equivalent foreign

(i) expulsion or suspension from membership,
(ii) bar or suspension from association,
(iii) denial of trading privileges,
(iv) order denying, suspending, or revoking registration or barring or suspending association, or
(v) finding with respect to causing any such effective foreign suspension, expulsion, or order . . . .

* * *

(4) effects transactions in securities with or for, or induces or attempts to induce the purchase or sale of any security by:

(i) a registered broker or dealer, whether the registered broker or dealer is acting as principal for its own account or as agent for others, or a bank acting in a broker or dealer capacity as permitted by U.S. law;

(ii) the African Development Bank, the Asian Development Bank, the Inter-American Development Bank, the International Bank for Reconstruction and Development, the International Monetary Fund, the United Nations, and their agencies, affiliates, and pension funds;

(iii) a foreign person temporarily present in the United States, with whom the foreign broker or dealer had a bona fide, pre-existing relationship before the foreign person entered the United States;

(iv) any agency or branch of a U.S. person permanently located outside the United States, provided that the transactions occur outside the United States; or

(v) U.S. citizens resident outside the United States, provided that the transactions occur outside the United States, and that the foreign broker or dealer does not direct its selling efforts toward identifiable groups of U.S. citizens resident abroad.

* * *

(b) When used in this rule,

(3) the term "foreign broker or dealer" shall mean any non-U.S. resident person (including any U.S. person engaged in business as a broker or dealer entirely outside the United States, except as otherwise permitted by this rule) that is not an office or branch of, or a natural person associated with, a registered broker or dealer, whose securities activities, if conducted in the United States, would be described by the definition of "Broker" or "Dealer" in sections 3(a)(4) or 3(a)(5) of the Act.

* * *

(5) the term "registered broker or dealer" shall mean a person that is registered with the Commission under sections 15(b), 15B(a)(2), or 15C(a)(2) of the Act.

(6) the term "United States" shall mean the United States of America, including the States and any territories and other areas subject to its jurisdiction.

* * *

[Adopted in Release No. 34-27017, effective August 15, 1989]

Supreme Court, U.S.
FILED
SEP 15 1999
OFFICE OF THE CLERK

No. 99-120

In the Supreme Court of the United States

TUSCHNER & COMPANY, INC., AND JOHN M. TUSCHNER,
PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

HARVEY J. GOLDSCHMID
General Counsel
DAVID M. BECKER
Deputy General Counsel
ERIC SUMMERGRAD
Deputy Solicitor
RADA L. POTTS
Special Counsel
Securities and Exchange Commission
Washington, D.C. 20549

QUESTIONS PRESENTED

1. Whether the district court had subject matter jurisdiction to enforce a bar order of the Securities and Exchange Commission prohibiting association with a particular broker-dealer, where the barred person, while residing in Greece, solicited Greek customers for a United States brokerage firm, opened accounts for them with that firm, and directed trading through that firm in securities of a United States company on United States markets.

2. Whether the district court committed clear error in finding that the person subject to the bar order was an "associated person" of petitioners.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Arthur Lipper Corp., 46 S.E.C. 78 (1975)	11
Continental Grain (Australia) Pty. Ltd. v. *Pacific Oilseeds, Inc.*, 592 F.2d 409 (8th Cir. 1979)	7, 8, 10
EEOC v. *Arabian Am. Oil Co.*, 499 U.S. 244 (1991)	11
Europe and Overseas Commodity Traders, S.A. v. *Banque Paribas London*, 147 F.3d 118 (2d Cir. 1998), cert. denied, 119 S. Ct. 1029 (1999)	10
Kauthar SDN BHD v. *Sternberg*, 149 F.3d 659 (7th Cir. 1998), cert. denied, 119 S. Ct. 890 (1999)	8
Kook v. *Crang*, 182 F. Supp. 388 (S.D.N.Y. 1960)	11
Registration Requirements for Foreign Broker-Dealers, Exchange Act Rel. No. 27017 (July 11, 1989), 43 S.E.C. Docket 2471 (July 25, 1989)	12, 13
Roth v. *Fund of Funds, Ltd.*, 405 F.2d 421 (2d Cir. 1968), cert. denied, 394 U.S. 975 (1969)	11
SEC v. *Blavin*, 760 F.2d 706 (6th Cir. 1985)	9
SEC v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963)	9
SEC v. *Kasser*, 548 F.2d 109 (3d Cir. 1977), cert. denied, 431 U.S. 938	10
SEC v. *Rana Research, Inc.*, 8 F.3d 1358 (9th Cir. 1993)	9
SEC v. *United Fin. Group, Inc.*, 474 F.2d 354 (9th Cir. 1973)	11

Cases—Continued: Page

SEC v. *Zahareas*, Civil Action No. 3-92-CV-431 (D. Minn. July 16, 1992) 2
Sinva, Inc. v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 48 F.R.D. 385 (S.D.N.Y. 1969) 11
Travis v. *Anthes Imperial Ltd.*, 473 F.2d 515 (8th Cir. 1973) 7, 11
Van Alstyne, Noel & Co., 43 S.E.C. 1080 (1969) 13
William V. Giordano, Exchange Act Rel. No. 36742 (Jan. 19, 1996), 61 S.E.C. Docket 453 (Feb. 20, 1996) 14
Zoelsch v. *Arthur Andersen & Co.*, 824 F.2d 27 (D.C. Cir. 1987) 8, 10

Statutes and regulations:

Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*:
§ 3(a)(17), 15 U.S.C. 78c(a)(17) 11
§ 3(a)(18), 15 U.S.C. 78c(a)(18) 13, 14
§ 15(b)(4), 15 U.S.C. 78*o*(b)(4) 13
§ 15(b)(6), 15 U.S.C. 78*o*(b)(6) 13
§ 15(b)(6)(B), 15 U.S.C. 78*o*(b)(6)(B) 13
§ 15(b)(6)(B)(i), 15 U.S.C. 78*o*(b)(6)(B)(i) 5-6
§ 15(b)(6)(B)(ii), 15 U.S.C. 78*o*(b)(6)(B)(ii) 6
§ 30(b), 15 U.S.C. 78dd(b) 10, 11
17 C.F.R.:
Section 240.15a-6 15
Section 240.15a-6(a)(4)(i) 12
Section 240.15a-6(b)(3) 12
Section 240.15c3-1 13
Section 240.15c3-3 13
Section 240.17a-3 13
Section 240.17a-4 13
Section 240.17a-5 13

Miscellaneous:

Letter from an Associate Director of the Commission's Division of Market Regulation to the Director of Legal and Compliance Department of Bear, Stearns & Co. (Jan. 7, 1976) 15

Miscellaneous—Continued: Page

Letter from Commission's Division of Market Regulation to Gordon S. Macklin, President of NASD, [1982-1983] Fed. Sec. L. Rep. (CCH) (June 18, 1982) 14

In the Supreme Court of the United States

No. 99-120

TUSCHNER & COMPANY, INC., AND JOHN M. TUSCHNER, PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 167 F.3d 396. The opinion of the district court (Pet. App. 8a to 27a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1999. A petition for rehearing was denied on April 16, 1999 (Pet. App. 7a). The petition for a writ of certiorari was filed on July 15, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On July 27, 1993, the Securities and Exchange Commission (SEC or Commission) found that Nicholas Zahareas had committed fraud in violation of the federal securities laws. See generally *SEC* v. *Zahareas*, Civil Action No. 3-92-CV-431 (D. Minn. July 16, 1992). The Commission issued a consent order against him, barring him from association with any broker, dealer, municipal securities dealer, investment adviser, or investment company. Pet. App. 9a-10a.

In 1996 petitioner John Tuschner, the chairman and CEO of petitioner Tuschner & Co., a Minneapolis securities firm, was introduced to Zahareas, who was residing in Athens, Greece. Tuschner viewed Zahareas as a potential selected dealer for an offering of securities of ACT Teleconferencing, Inc., for which Tuschner & Co. was the managing underwriter. Tuschner abandoned that idea when he learned that Zahareas was subject to a Commission bar order. Instead, Tuschner & Co. began paying a fee to Zahareas's wife, purportedly for her solicitation of Greek customers for Tuschner & Co. Pursuant to that arrangement, Zahareas's wife referred at least 12 Greek customers to Tuschner & Co. during the first months of 1996. SEC C.A. Br. 6-7.[1]

After the ACT public offering closed, Zahareas established a firm called Euroamerican. Tuschner and Zahareas entered into an oral agreement under which Zahareas was ostensibly to act as a "foreign finder" for Tuschner & Co., "referring" customers to Tuschner &

---

[1] A copy of the SEC's court of appeals brief has been lodged with the Clerk of this Court. It includes appropriate citations to the record to document the facts recited herein.

Co. and receiving up to 75% of the revenues generated from trades in the accounts he referred. As of July 31, 1997, Tuschner & Co. had approximately 200 Greek customers referred by Zahareas, and between March 1997 and July 1997 alone, those customers purchased or sold, on a United States market, at least $9,430,000 worth of securities in a United States company through Tuschner & Co. From those transactions Tuschner & Co. earned gross commissions of at least $213,554, of which at least $144,973 was paid to Zahareas through Euroamerican. SEC C.A. Br. 8-9.

The Greek investors Zahareas solicited became customers of Tuschner & Co. The firm supplied Zahareas with new account forms bearing the name of Tuschner & Co.'s clearing broker and including, among other things, an account agreement incorporating the laws of the State of Minnesota. Zahareas (or a Euroamerican associate) would complete the forms and send them to Tuschner & Co. for review. If Tuschner & Co. employees determined that additional information was needed to render account documentation complete and accurate, they would direct Zahareas to provide it. On at least one occasion, Tuschner & Co.'s compliance officer "remind[ed]" Zahareas of the requirement that account documentation be "reasonably complete and accurate and truthful, et cetera, et cetera." SEC C.A. Br. 9-10.

Tuschner & Co. then opened accounts for its Greek customers. The process for opening those accounts was virtually identical to that for opening any other Tuschner & Co. customer account. For example, the firm assigned its Greek customers account numbers and mailed them "welcome" or "thank you" letters signed by Tuschner – the same letter it sent all its customers. Together with the letter, Tuschner & Co. included

copies of the customers' account forms for verification. Trading in the Greek customers' accounts also occurred in the same fashion as in other accounts. Tuschner & Co.'s trader, John Penshorn, was responsible for executing customer orders in United States markets—including those of Tuschner & Co.'s Greek customers—on the instruction of Tuschner & Co. representatives. Initially, those instructions came through John Tuschner, but sometime in late 1996 or early 1997, Tuschner authorized Penshorn to execute trades in the Greek customers' accounts on Zahareas's instruction. SEC C.A. Br. 11.

Zahareas thereafter effected transactions in the same manner as did any Tuschner & Co. representative operating from a remote location. Zahareas would call Penshorn up to six times a day to instruct him about what securities (typically ACT securities) to buy or sell for Tuschner & Co.'s Greek customers. Penshorn filled out order tickets reflecting Zahareas's instructions and executed the trades. And those order tickets, like order tickets reflecting transactions in the accounts of domestic customers, were reviewed by the firm's compliance officer. Penshorn also generated confirmations of these trades, which were mailed to Tuschner & Co.'s Greek customers, as were monthly account statements bearing Tuschner & Co.'s logo. Once in a while, Tuschner & Co.'s back-office employees would enclose something else in the envelope, such as a form requiring a signature. Records relating to Tuschner & Co.'s Greek customers' accounts, including correspondence received directly from those customers, were maintained in the same fashion as those of Tuschner & Co.'s other customers. SEC C.A. Br. 11-12.

Tuschner & Co. assigned to Euroamerican an "account executive" or representative number that was

reflected on the confirmations and monthly statements mailed to Greek customers. In addition, Zahareas regularly requested and received from Penshorn, Tuschner, and others at the firm internal reports regarding the Greek customers' accounts, such as "Money Line"—a report Tuschner & Co. representatives used to monitor cash balances in their customers' accounts. Zahareas was compensated for trades in Tuschner & Co.'s Greek customers' accounts in the same fashion as any Tuschner & Co. representative because the trades in those accounts were "regular business." At the end of each month, Zahareas's compensation was recorded in the same manner as was the compensation due any Tuschner & Co. representative. Moreover, when Tuschner & Co.'s trading department lost money on a transaction Zahareas requested, Zahareas, like any Tuschner & Co. representative, was charged for that loss in the form of a deduction from his compensation. SEC C.A. Br. 12-13.

After the Commission began its investigation, Tuschner & Co. stopped paying commissions to Zahareas on the Greek customers' trades. Tuschner sent Zahareas a letter on September 3, 1997, stating that Tuschner & Co. and Euroamerican should cease doing business pending completion of the Commission's investigation and should transfer the accounts to a different Greek broker-dealer or investment adviser. According to Tuschner, Zahareas had "no choice" about whether his relationships with the Greek customers would be severed. SEC C.A. Br. 13-14.

2. a. The Commission filed its complaint in December 1997, alleging that Zahareas had associated with Tuschner & Co., in violation of the 1993 Commission bar order and Section 15(b)(6)(B)(i) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C.

78*o*(b)(6)(B)(i); that Tuschner & Co. had allowed him to become so associated, in violation of Section 15(b)(6)(B)(ii) of the Act; and that Zahareas and Tuschner had aided and abetted those violations. The Commission sought an order compelling Zahareas to comply with the bar order, and it further sought injunctive relief, disgorgement, and a civil money penalty. SEC C.A. Br. 14-15.

On January 28, 1998, the district court denied the defendants' motions to dismiss and granted the Commission's motion for a preliminary injunction. Pet. App. 9a. The district court first held that it had subject matter jurisdiction, reasoning that "sufficient activity of the defendants alleged by the Commission to be in violation of the Exchange Act and prior Commission bar order occurred in this country." *Id.* at 15a. The court noted that the defendants had corresponded frequently and had met at least once in this country. *Ibid.* "Further," it observed, "the Greek customer accounts are located in Minnesota and the trading that took place in these accounts occurred through a Minnesota brokerage" on a United States market. *Ibid.*

The court then held, on the merits, that Zahareas was an "associated person" of Tuschner & Co. because he had "served as an agent of Tuschner & Co. by orchestrating Tuschner & Co.'s trading in the Greek accounts." Pet. App. 21a. The court explained that Zahareas had referred Greek customers to Tuschner & Co., completed all information to open accounts for them at the firm, directed trading in the accounts, received reports on the accounts, "and served as the only means through which Tuschner & Co. had contact with its Greek customers." *Id.* at 21a-22a. The court further found that there was "no evidence of a relationship between these customers and Euroamerican." *Id.*

at 22a. In sum, the court concluded, Zahareas's activities "were similar to those of a Tuschner & Co. broker at a remote location." *Ibid.* The court thus entered preliminary injunctions against the defendants. *Id.* at 22a-26a.

b. The court of appeals affirmed "for the reasons set forth in the district court's opinion." Pet. App. 3a. Judge Morris Arnold dissented on the ground that the facts found by the Commission "were not inconsistent with two separate companies doing business with each other," and that the Commission had therefore "failed to establish that Mr. Zahareas was under Tuschner & Co.'s control." *Id.* at 3a-5a.

ARGUMENT

1. a. Petitioner contends that, in upholding the district court's exercise of subject-matter jurisdiction, the court of appeals has created a "conflict" (Pet. 7) with the law of other circuits on the jurisdictional reach of the securities laws. That is incorrect. As an initial matter, the Eighth Circuit's per curiam decision, which summarily affirmed an unpublished district court order, is of limited precedential significance. In any event, the result below is entirely consistent with the decisions of other courts of appeals.

In determining whether to apply the federal securities laws to transactions with a foreign entity, the courts have generally applied a pair of alternative tests: the "conduct" test and the "effects" test. See *Continental Grain (Australia) Pty. Ltd.* v. *Pacific Oilseeds, Inc.*, 592 F.2d 409, 417, 420 (8th Cir. 1979). Under the conduct test, a court considers whether "there has been significant conduct with respect to * * * alleged violations in the United States." *Travis* v. *Anthes Imperial Ltd.*, 473 F.2d 515, 524 (8th Cir. 1973); see also

Continental Grain, 592 F.2d at 419-420.[2] That test is easily met in this case. Although Zahareas resided in Greece and made trades for Greek residents, he did so by impermissibly associating with a United States brokerage firm and by using his position with that firm to effect transactions in securities of a United States company on a United States market.

Petitioners argue that, in the course of making that determination, the district court erroneously formulated the inquiry as whether "*some* activity involving a violation of the Exchange Act occurred in this country" (Pet. 9 (quoting Pet. App. 14a) (emphasis added)), and they conclude that, in so doing, the court "abandoned the anchors which have previously grounded extra-territoriality jurisprudence" (Pet. 10). That is not so. To begin with, the district court's formulation of the standard was immaterial to the result it reached, because in fact the bulk of the events at issue occurred

---

[2] As petitioners note (Pet. 8 n.5), many courts of appeals—including the Eighth Circuit—apply some variant of this conduct test. Although the test has been articulated in different ways, see generally *Kauthar SDB BHD* v. *Sternberg*, 149 F.3d 659, 663-667 (7th Cir. 1998), cert. denied, 119 S. Ct. 890 (1999), those differences are not relevant here, and petitioners do not contend otherwise. As an initial matter, the differences in formulating the test have typically arisen in the context of private suits for damages; as discussed on p. 9 below, such suits raise quite different jurisdictional questions from those presented by suits brought by the Commission to enforce prophylactic remedies such as bar orders. In any event, the facts of this case would satisfy the principles underlying even the most stringent form of the conduct test, under which the conduct in this country must constitute the elements of the alleged violation. See, *e.g.*, *Zoelsch* v. *Arthur Andersen & Co.*, 824 F.2d 27, 30-33 (D.C. Cir. 1987). Here, the relevant conduct in this country constituted an impermissible association between Zahareas and Tuschner & Co.

in this country. In any event, the district court made clear in the same passage that it was adhering to the Eighth Circuit's prior decisions in *Continental Grain* and *Travis* (see Pet. App. 14a-15a), and petitioners themselves cite *Continental Grain*, with evident approval, as an example of an application of the "conduct" test (see Pet. 8 n.5). The Eighth Circuit's summary affirmance cannot plausibly be construed as a repudiation of that existing precedent.

Petitioners also attribute apparent significance (Pet. 8) to the proposition, contained in several judicial opinions, that the "conduct" test requires proof that the conduct in the United States was causally related to "the resultant harm to foreign investors." That proposition, however, is irrelevant to the question presented here. The cases that petitioners cite involved private claims for damages; in that context, it is pertinent to examine the relationship between the conduct and the resulting harm. In this case, by contrast, the Commission seeks to enforce a prophylactic remedy against an individual deemed unfit to act as a securities professional in this country. When the Commission seeks to enforce such a remedy, it need demonstrate only a potential for harm; it need not wait until harm has actually occurred. See, *e.g.*, *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963); *SEC* v. *Rana Research, Inc.*, 8 F.3d 1358, 1363 n.4 (9th Cir. 1993); *SEC* v. *Blavin*, 760 F.2d 706, 711 (6th Cir. 1985).

Petitioners also liken this case to one involving the registration or filing provisions of the securities laws, and they argue that such cases present more stringent jurisdictional requirements than do fraud cases. Pet. 9. But that argument rests on a mischaracterization of this case. Although the Commission has not alleged that Zahareas committed fraud in the transactions at

issue, neither is it simply seeking to enforce a regulatory measure such as securities registration. Again, the purpose of this action is to enforce a 1993 bar order issued after the Commission determined that Zahareas had engaged in fraudulent conduct. The Commission determined in that order that Zahareas poses so substantial a risk to investors that he should be barred from the United States securities business. A court may appropriately exercise jurisdiction to enforce that order, even if the potential victims of any wrongdoing might be foreign investors using United States securities markets, for Congress did not want the United States "to become a base for fraudulent activity harming foreign investors." *Europe and Overseas Commodity Traders, S.A.* v. *Banque Paribas London*, 147 F.3d 118, 125 (2d Cir. 1998), cert. denied, 119 S. Ct. 1029 (1999); see also *Zoelsch* v. *Arthur Andersen & Co.*, 824 F.2d 27, 32-33 (D.C. Cir. 1987); *SEC* v. *Kasser*, 548 F.2d 109, 116 (3d Cir.), cert. denied, 431 U.S. 938 (1977); *Continental Grain*, 592 F.2d at 421- 422.

b. Petitioners devote much of their argument to a variety of statutory and regulatory provisions that neither of the courts below discussed. See Pet. 11-21. As an initial matter, this Court does not ordinarily grant certiorari to consider issues that no lower court has expressly examined. In any event, the provisions on which petitioners rely do not support their position here.

First, petitioners can derive no support from Section 30(b) of the Exchange Act, 15 U.S.C. 78dd(b), which excludes from the Act's coverage a person who "transacts a business in securities without the jurisdiction of the United States, unless he transacts such business in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate

to prevent the evasion of this [title]." Section 30(b) does not, as petitioners argue, exempt someone from the coverage of the federal securities laws merely because he operates from outside the territorial limits of the United States. See, *e.g.*, *SEC* v. *United Fin. Group, Inc.*, 474 F.2d 354, 357-358 (9th Cir. 1973); *Arthur Lipper Corp.*, 46 S.E.C. 78, 91 (1975); see also *Travis*, 473 F.2d at 526 n.21.[3] One who resides outside the United States, but who associates with a firm in the United States, and who otherwise engages in significant securities conduct in the United States, does not fall "without the jurisdiction of the United States." See *Roth* v. *Fund of Funds, Ltd.*, 405 F.2d 421, 422 (2d Cir. 1968), cert. denied, 394 U.S. 975 (1969). As the scant authority cited by petitioners suggests (Pet. 14), Section 30(b) has been applied rarely and only where the transactions at issue, while involving some contacts with the United States, were in all significant respects foreign. See *Kook* v. *Crang*, 182 F. Supp. 388, 390 (S.D.N.Y. 1960) ("All the essentials of these transactions occurred without the United States."); *Sinva, Inc.* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 48 F.R.D. 385, 386 (S.D.N.Y. 1969) ("There was not the slightest evidence that any of the commodity futures

---

[3] Petitioners argue (Pet. 13) that Section 30(b) was intended to codify the rule, articulated in *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244, 248 (1991), that, unless Congress indicates a contrary intent, its laws are to be applied only within the territorial jurisdiction of the United States. But that argument misses the central point: The conduct at issue here occurred largely, albeit not entirely, in the United States. Moreover, when Congress defined "interstate commerce" in the Exchange Act, it expressly included "trade, commerce, transportation, or communication * * * between any foreign country and any State." 15 U.S.C. 78c(a)(17).

transactions in issue were executed on any exchange in the United States.").

There is also no merit to petitioners' claim that their conduct is exempt from regulation on the theory that it falls within the scope of the SEC's Rule 15a-6(a)(4)(i), 17 C.F.R. 240.15a-6(a)(4)(i), which exempts from broker-dealer registration "[a] foreign broker or dealer" who, *inter alia*, "[e]ffects transactions in securities with * * * [a] registered broker or dealer, whether the registered broker or dealer is acting as principal for its own account or as agent for others." First, that rule applies only to a person who is a "foreign broker or dealer," and that term is expressly defined, in Rule 15a-6(b)(3), 17 C.F.R. 240.15a-6(b)(3), to exclude any "natural person associated with[] a registered broker or dealer." See also *Registration Requirements for Foreign Broker-Dealers*, Exchange Act Rel. No. 27017 (July 11, 1989), 43 S.E.C. Docket 2471, 2478 (July 25, 1989) (July 1989 Release). Here, as the courts below found, Zahareas was an associated person of a registered broker-dealer, and he therefore did not fall within the relevant statutory definition.

Moreover, even if Rule 15a-6 were somehow applicable to the conduct here, the rule provides an exemption only from broker-dealer registration. Although petitioners repeatedly conflate "registration" with "regulation" (Pet. 15-21), Rule 15a-6, like the related authorities cited by petitioners, does not provide a blanket exemption from all securities regulation. As the Commission noted in its release adopting the rule, many provisions of the federal securities laws, and many of the Commission's regulations, apply on their face to

unregistered broker-dealers.[4] Although the Commission added that as a matter of policy its staff would not recommend that the Commission take enforcement action against foreign broker-dealers for want of compliance with" many of those provisions, the Commission reaffirmed that such broker-dealers *would* remain subject to Sections 15(b)(4) and 15(b)(6) of the Act, 15 U.S.C. 78*o*(b)(4) and 78*o*(b)(6). July 1989 Release, 43 S.E.C. Docket at 2473 n.22. It is Section 15(b)(6)(B) that petitioners are charged with violating here.

2. Finally, petitioners claim (Pet. 22-29) that the courts below erred in finding that Zahareas was an associated person of Tuschner & Co. That claim is fact-bound and wrong, and it warrants no further review.

Section 3(a)(18) of the Exchange Act, 15 U.S.C. 78c(a)(18), defines "person associated with a broker or dealer" and "associated person of a broker or dealer" to include "any person directly or indirectly * * * controlled by * * * such broker or dealer, or any employee of such broker or dealer." Section 3(a)(18) is construed broadly "so as to prevent evasion of the Act's proscription against broker-dealers engaging in the securities business with associated persons subject to statutory disqualification." *Van Alstyne, Noel & Co.*, 43 S.E.C. 1080, 1087 (1969).[5]

---

[4] See July 1989 Release, 43 S.E.C. Docket at 2473 n.22 (Tuschner C.A. App. 49) (citing Sections 15(b)(4) and 15(b)(6) of the Exchange Act, 15 U.S.C. 78*o*(b)(4) and 78*o*(b)(6), and Rules 15c3-1 (net capital requirements), 15c3-3 (customer protection—reserves and custody of securities), 17a-3 (records), 17a-4 (records maintenance), 17a-5 (reports); 17 C.F.R. 240.15c3-1, 15c3-3, 17a-3, 17a-4, 17a-5 (1997)).

[5] An associated person need not be an "employee" of the firm, although Zahareas fell within the scope of that term as well. As used in Section 3(a)(18), the term "employee" is construed with

The district court properly concluded that Zahareas associated with Tuschner & Co. as its agent, performing the usual and customary functions of a Tuschner & Co. representative at a remote location. Pet. App. 21a-23a. He solicited customers for the firm, principally recommended to them securities in which Tuschner was making a market, opened accounts for them at Tuschner, directly gave orders to Tuschner's trading department, and monitored the customer accounts at Tuschner. See SEC C.A. Br. 9-13, 40-41; see also pp. 2-5, *supra*.[6]

Despite petitioners' claims to the contrary, this case is readily distinguishable from an ordinary correspondent (or "introducing-clearing") relationship between a domestic brokerage firm and a truly independent foreign broker-dealer. First, when asked during the

---

unusual breadth; for example, in this context, though not in many others, an independent contractor can be deemed an "employee." See, *e.g.*, *William V. Giordano*, Exchange Act Rel. No. 36742 (Jan. 19, 1996), 61 S.E.C. Docket 453, 458 (Feb. 20, 1996); Letter from Commission's Division of Market Regulation to Gordon S. Macklin, President of NASD, [1982-1983] Fed. Sec. L. Rep. (CCH) ¶ 77,303, at 78,117 (June 18, 1982). This case does not squarely present any issue concerning Zahareas's "employee" status, because he qualifies as an "associated person" on the independent ground that his conduct was controlled by Tuschner & Co.

[6] The dissent below (Pet. App. 5a) viewed the district court's finding that Zahareas was acting as an agent for Tuschner & Co. as inconsistent with that court's statement (*id.* at 22a) that "Zahareas exerted control over Tuschner & Co. with regard to the handling of the Greek accounts." But the district court obviously did not mean that Tuschner & Co. was somehow working for Zahareas. Read in context, the court's reference to control meant only that, as is common with agents, Zahareas was entrusted to exercise considerable authority on behalf of his principal. Of course, Tuschner & Co., which subjected the transactions to its own compliance oversight, retained ultimate control over the transactions and over whether Zahareas would continue as its agent.

Commission's investigation, Tuschner officials affirmed that this was not a correspondent relationship and that Euroamerican was not acting as a correspondent broker. See SEC C.A. Br. 42. When asked specifically whether Euroamerican was acting as an introducing broker, Tuschner & Co.'s compliance officer answered "no." *Ibid.* (citing SEC C.A. App. 136-137). Indeed, when asked whether "the idea of making Euroamerican a corresponding broker" had been discussed among the persons at Tuschner & Co. who were deciding how to treat the relationship with Zahareas, the compliance officer answered "I don't believe so." *Ibid.* (citing SEC C.A. App. 77).

Moreover, when an independent foreign broker-dealer introduces its clients to an American firm, it ordinarily has a substantial business apart from its relation with the American firm, and its relation with that firm is merely one part of its securities business.[7] The evidence here, however, indicates that Euroamerican was created for the purpose of locating Greek customers for Tuschner and handling their Tuschner accounts. The district court found (Pet. App. 22a) that there was no record evidence that these Greek customers had any relationship with Euroamerican apart from the work done for Tuschner.

In addition, Zahareas was compensated in exactly the same fashion as any other Tuschner & Co. representa-

---

[7] Such a relationship describes the circumstances underlying the Bear Stearns no-action letter, which petitioners erroneously characterize as "mirror[ing] the facts of this case in all essential respects." Pet. 20-21 n.23 (discussing adoption of Rule 15a-6 and the positions taken by the Commission's staff in Letter from an Associate Director of the Commission's Division of Market Regulation to the Director of Legal and Compliance Department of Bear, Stearns & Co. (Jan. 7, 1976)).

tive, he was dunned for trading losses in the same way, and he was subject to the same oversight by Tuschner's compliance director to which other representatives were subjected. See pp. 3-5, *supra*. Finally, when Tuschner, in the wake of the Commission's investigation, decided it could no longer use Zahareas, it ostensibly got rid of him but retained the customers. See Pet. App. 12a-13a. If, in fact, Zahareas were not working for Tuschner, the firm, after allegedly severing its relation with Zahareas, would not have asserted control of the accounts, accepted new accounts, and traded in accounts of customers Zahareas had solicited. In sum, the facts in the record amply support the district court's finding that Zahareas was an "associated person" of Tuschner & Co., and petitioners' contrary contention warrants no further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

HARVEY J. GOLDSCHMID
General Counsel

DAVID M. BECKER
Deputy General Counsel

ERIC SUMMERGRAD
Deputy Solicitor

RADA L. POTTS
Special Counsel
Securities and Exchange Commission

SEPTEMBER 1999

(3)

Supreme Court, U.S.
FILED
SEP 29 1999
OFFICE OF THE CLERK

No. 99-120

IN THE

Supreme Court of the United States

TUSCHNER & COMPANY, INC. and
JOHN M. TUSCHNER,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY BRIEF

James H. Schropp
Counsel of Record
FRIED, FRANK, HARRIS, SHRIVER & JACOBSON
1001 Pennsylvania Avenue, N.W.
Suite 800
Washington, D.C. 20004
(202) 639-7000

Counsel for Petitioners

Balmar Legal Publishing Services, Washington, DC 202-682-9800

12 pp

TABLE OF AUTHORITIES

Cases **Page(s)**

Bear Stearns & Co., International Series Rel. No. 85, 43 SEC Docket (CCH) 608 (Jan. 7, 1976) 8

Bersch v. Drexel Firestone, Inc., 519 F.2d 974 (2d Cir.) *cert. denied*, 423 U.S. 1018 (1975) 3

Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, *as amended*, 890 F.2d 569 (2d Cir. 1989) 3, 4

Europe and Overseas Commodity Traders, S.A. v. Banque Paribas London, 147 F.3d 118 (2d Cir. 1998), *cert. denied*, 119 S.Ct. 1029 (1999) 3

Plessey Co. PLC v. General Electric Co. PLC, 628 F. Supp. 477 (D. Del. 1986) 3

Teicher v. SEC, 177 F.3d 1016 (D.C. Cir. 1999) 3

Statutes and Regulations:

15 U.S.C. § 78dd(b) 2, 4, 7

15 U.S.C. § 78c(a)(9) 5

15 U.S.C. § 78c(a)(4) 5

15 U.S.C. § 78o(a) 5

17 C.F.R. § 240.15a-6 *passim* ..... *passim*

Miscellaneous:

Restatement (Third) of the Foreign Relations Law of the United States, Section 416 4

SEC Release 34-27017, 54 Fed. Reg. 30030, n.203, and 30019, n.58 8

SEC Release 34-25801, 1988 WL 2397769 (S.E.C.) 10

SEC Amicus Curiae Brief in *Consolidated Gold Fields* (Dec. 1998) 4, 6

"Do It Yourself: Online Brokerage Firms Want to Make Overseas Investing Just a Few Clicks Away," THE WALL STREET JOURNAL, Apr. 26, 1999 8

No. 99-120

IN THE

Supreme Court of the United States

TUSCHNER & COMPANY, INC. and
JOHN M. TUSCHNER,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY BRIEF

The assertion of the Securities and Exchange Commission ("Commission" or "SEC") that the district court has subject matter jurisdiction of the SEC's claim – *i.e.*, a claim that the broker-dealer regulatory provisions of the federal securities laws require the principal of a foreign securities broker, who does business on behalf of his foreign customers with a United States broker, to register and be subject to SEC regulation as an "associated person" of that United States broker – depends upon the validity of four SEC contentions:

(i) a test developed by the lower courts to determine the scope of the *antifraud provisions* should also be used to ascertain the reach of the *broker-dealer regulatory provisions* here in issue, see Opp. at 7-10;

(ii) in applying the test, the courts should ignore Section 30(b) of the Securities Exchange Act of 1934 ("Exchange Act"),[1] the only provision of the Exchange Act in which Congress addressed the cross-border reach of that statute, Opp. at 11-12;

(iii) the plain words of SEC Rule 15a-6[2] do not mean what they say and the fact that the SEC affirmatively decided *not* to preclude barred persons from relying on the exemption provided by subsection (a)(4)(i) of the Rule should also be disregarded, Opp. at 12-13; and

(iv) the statutory term "associated person" should be given an entirely unworkable definition which no court or prior administrative decision has endorsed, Opp. at 13-16.

For the reasons stated in the Petition and herein, these contentions are in error. The petitioners[3] respectfully request that a writ of certiorari issue to address the Eighth Circuit's departure from established precedent regarding the extraterritorial application of the federal securities laws.

1. Other than the courts below, courts have not applied either the "conduct" test or the "effects" test, judicially-created rules developed to determine the extraterritorial scope of the antifraud provisions of the securities laws, to the regulatory provisions pertaining, *inter alia*, to the registration

---

[1] Congress specified in Section 30(b) that no provision of the Exchange Act shall apply to a foreign "business in securities," unless otherwise provided in SEC rules. 15 U.S.C. § 78dd(b).

[2] Under Rule 15a-6, a foreign broker may, on behalf of his customers, "effect transactions in securities with . . . a registered broker or dealer," without triggering the broker-dealer registration provisions of the securities law. 17 C.F.R. § 240.15a-6(a)(4)(i).

[3] Since the filing of the Petition, John Tuschner has resigned from his positions at Tuschner & Co. The company no longer conducts broker-dealer operations and, on September 1, 1999, it filed an application with the SEC to withdraw its broker-dealer registration. These developments do not moot the issues raised in the Petition, as the SEC continues to seek all the relief requested in its Complaint.

of persons, entities or securities. To the contrary, courts have concluded that "the antifraud provisions of American securities laws have broader extraterritorial reach than American filing requirements." *Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 262 *as amended*, 890 F.2d 569 (2d Cir. 1989).[4] Here, in both relaxing the requirements of the "conduct" test and applying the liberalized test to regulatory provisions pertaining to the definition and registration of "associated persons," the lower courts came to the opposite conclusion, conferring even greater scope on an "American filing requirement" than has previously been afforded the antifraud provisions. This holding represents a departure from the established extraterritorial jurisprudence of other federal courts, which has created a substantial conflict.

The SEC offers one reason why the prior cases determining the extraterritorial scope of the antifraud provisions apply here: in this case, the SEC points out, it is seeking to "enforce" its 1993 regulatory bar order against Zahareas. Opp. at 9-10. This puts the cart before the horse. As the SEC concedes (Opp. 10), its 1993 order barred Zahareas solely from "the *United States* securities business;" since Zahareas never sought to re-enter the *United States* securities industry, there is no basis upon which the SEC could seek to "enforce" the bar order.[5] Moreover, the SEC's observation (Opp. 10) that "Congress did not want" the United States to become a "base for fraudulent activity" is singularly inappropriate. The SEC *found* no fraud during its extensive investigation, it *alleged* no fraud in its Complaint,

---

[4] *See also, Europe and Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 124 (2d Cir. 1998), *cert. denied*, 119 S.Ct. 1029 (1999); *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 986 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975). *Plessey Co. PLC v. General Electric Co. PLC*, 628 F. Supp. 477 (D. Del. 1986).

[5] *Cf., Teicher v. SEC*, 177 F.3d 1016 (D.C. Cir. 1999) (SEC bar order was in excess of SEC's powers, to the extent it purported to bar broker from other securities-related professions).

and, in any event, all the significant conduct in this case involving customer contact (the only conduct which *could* have involved fraud) occurred *entirely* in Greece.

In contrast to its position here, the SEC aptly noted in its *amicus* brief in the Second Circuit in *Consolidated Gold Fields PLC v. Minorco, S.A.*, *supra*, that it is "well-settled" that the antifraud provisions of the federal securities laws apply more broadly than "registration requirements." SEC Brief (Dec. 1988) at 16. The SEC explained, *id.* at 17:

> This is because antifraud provisions are designed to enforce fundamental notions of honesty. Moreover, fraud is universally proscribed, while registration and filing requirements may vary considerably in different countries, and compliance with the antifraud provisions generally imposes less of a burden on foreign companies than does compliance with regulatory requirements.[6]

The SEC was correct in its 1988 Brief, and correct in 1989 when it enacted Rule 15a-6. The position it takes here is wrong.

2. With respect to the Section 30(b) and Rule 15a-6 issues, the SEC itself alleges both that Zahareas conducted a "business in securities" in Greece[7] and that, acting

---

[6] In so stating, the SEC relied upon the Restatement (Third) of the Foreign Relations Law of the United States, Section 416, Comment a (titled "Jurisdiction to Regulate Activities Related to Securities") which states that "an interest in punishing fraudulent or manipulative conduct is entitled to greater weight than are routine administrative requirements," such as an "obligation to file . . . not directly associated with fraud." *Id.* at 297 and Reporters' Note 2 at 300. *See* SEC Brief in *Consolidated Gold Fields* at 17.

[7] 15 U.S.C. § 78dd(b). In its Complaint, a copy of which is being lodged with this Court, the SEC alleged, *id.* at ¶ 14: Euroamerican is a "Greek brokerage firm, based in Athens, Greece." Since Euroamerican is a foreign "broker" for purposes of the securities laws, Zahareas necessarily is also, since a "broker" is any "person" (defined in Section 3(a)(9) of the Exchange Act to include both individuals and entities, 15

Footnote continued on next page . . .

independently of Tuschner Co., he "effect[ed] transactions in securities with ... a registered broker or dealer."[8] Nevertheless, the SEC advances the circular argument that Zahareas cannot be a "foreign broker" because he is, in fact, an "associated person" of Tuschner & Co. But the *reasons* offered as to *why* he is an "associated person" of Tuschner & Co. all come down to one thing: he participated in transactions that are specifically included in Rule 15a-6 as transactions which do not bring a foreign broker within the SEC's regulatory ambit.[9]

Footnote continued from previous page . .

U.S.C. § 78c(a)(9)) "engaged in the business" of effecting securities transactions as an agent. 15 U.S.C. § 78c(a)(4).

[8] 17 C.F.R. § 240.15a-6(a)(4)(i). See Complaint, ¶¶ 21-22: "Zahareas ... directed and controlled Euroamerican's ... transactions with Tuschner & Co.," whereby "the Greek accounts purchased and sold approximately $9 million worth of securities through Tuschner & Co." As the dissent in the Eighth Circuit pointed out, the facts alleged by the SEC showed that Tuschner & Co. and Euroamerican were simply "two separate companies doing business with each other," with neither "under the control of the other." Pet. App. 5a.

[9] The SEC contends that Section 30(b) applies only where the activities in issue, "while involving some contacts with the United States, were in all significant respects foreign." Opp. at 11. With respect to Zahareas' and Euroamerican's *broker-dealer* activities, the activities addressed by the *broker-dealer regulatory provisions* here in issue, that is of course precisely the case here. The SEC's purported distinction (Opp. at 12-13) between broker-dealer "registration" requirements and broker-dealer "regulation," and its contention that a foreign broker may be exempt from the less onerous "registration" requirements but not from the considerably more burdensome aspects of SEC "regulation," is inconsistent with the statutory scheme established by the Exchange Act. Under that scheme, registration is the gateway to regulation. If a broker is not required to register, it will not even be included in the SEC's census of regulated entities, and the SEC will have no viable means of monitoring its securities practices and financial condition, as the Exchange Act requires the SEC to do. The SEC does not explain the basis upon which it has purportedly elected to ignore, as to *some* brokers, a Congressional directive that *all* brokers subject to the Act register with the SEC. *See* 15 U.S.C. § 78o(a).

The SEC briefly suggests (Opp. at 10) that this Court should not grant certiorari because, in rejecting the petitioners' contention that subject matter jurisdiction of the SEC's claims was lacking, the lower courts did not "expressly" discuss Section 30(b) or Rule 15a-6. The SEC's own appellate brief, lodged with this Court by the SEC, illustrates that the Section 30(b) and Rule 15a-6 arguments made here were extensively argued below.[10] To the extent the SEC's observation is intended to suggest that the jurisdictional issues might be clarified by further proceedings below, that suggestion is directly contrary to the position taken by the SEC below. There, after its victory in the Eighth Circuit, the SEC immediately moved to strike all of the petitioners' affirmative defenses, including the defenses based on Section 30(b), Rule 15a-6 and lack of subject matter jurisdiction, and to preclude any discovery regarding the factual circumstances of other applications of Section 30(b) and Rule 15a-6. The district court recently granted both motions.[11] Thus, under the present law of the case, there will, as requested by the SEC below, be no further discovery, fact-finding or judicial consideration below of the subject matter jurisdiction issues.

Finally, the SEC has no response to the point made in the Petition (p. 21, n.24), that if the SEC believes that a barred individual who becomes a broker in a foreign nation just should not be allowed to engage in the transactions covered by Rule 15a-6(a)(4), it should have simply said so in the Rule

---

[10] *See* SEC Br. at 23-29, setting forth the SEC's counter-argument that neither Section 30(b) nor Rule 15a-6 "divested" the district court of subject matter jurisdiction.

[11] Magistrate Judge's Report and Recommendation (striking the defendants' affirmative defenses), August 23, 1999; Magistrate Judge's Order (denying Tuschner & Co.'s motion to compel SEC to designate a deposition witness knowledgeable as to, *inter alia*, the prior application of Rule 15a-6), August 23, 1999. The petitioners have moved the district court to reconsider both rulings; the motion is pending.

itself.[12] That is, after all, what the SEC did with respect to the foreign broker transactions covered by Rule 15a-6(a)(3) – *i.e.*, transactions effected with U.S. institutional investors through U.S. brokers. The fact that the very next subparagraph, Rule 15a-6(a)(4), contains no such limitation as to barred individuals can only be interpreted as an affirmative decision by the SEC, at the time it enacted the Rule, that such a preclusion was, if not impermissible under Section 30(b), at least neither necessary nor appropriate to protect U.S. investors or the U.S. securities markets.

3. The SEC contends (Opp. at 13) that its claim that Zahareas is an "associated person" of Tuschner & Co. is "fact-bound." But, at least for present purposes, the facts to which all parties are bound are the same facts upon which the lower courts decided the matter – the well-pleaded facts alleged by the SEC, taken as true.[13] While the SEC has, after the subject matter jurisdictional issue was raised, attempted to embroider and add pejorative coloration to its allegations, the Complaint has never been amended, all the embroidery has added nothing of substance, and the relevant facts remain as initially alleged by the SEC.

As to the merits of the issue, the SEC does not contend that status as a barred individual is a factor that has any bearing on the question whether one is an "associated person" of a particular firm; indeed, Section 3(a)(18) makes it clear that only a person's activities in relation to that firm can provide the basis for such a conclusion. But the SEC has never answered the question: why do Zahareas' activities to obtain U.S. securities for his Greek customers through the

---

[12] Moreover, in Section 30(b), Congress granted the SEC open-ended authority to prescribe rules to "prevent the evasion of" the Exchange Act by a foreign "business in securities." 15 U.S.C. § 78dd(b). This rule-making power has never been exercised by the SEC.

[13] The district court conducted no evidentiary proceedings before holding that the SEC was sufficiently likely to succeed upon its factual and legal claims to warrant injunctive relief. Pet. App. 19a-20a.

only available source, a U.S. broker-dealer, make him an "associated person," when the similar activities of other foreign brokers have never been held by the SEC to do so? *See, e.g., Bear Stearns & Co.*, International Series Rel. No. 85, 43 SEC Docket (CCH) 608 (Jan. 7, 1976).[14]

The SEC offers one rather remarkable basis to distinguish its *Bear Stearns* precedent from the facts of this case. The SEC suggests that the facts underlying *Bear Stearns* do not exactly mirror those of this case because the foreign broker that did business with Bear Stearns had "substantial business apart from its relation with the American firm." The SEC contends that there is "no record evidence" that the Greek customers "had any relationship with Euroamerican apart from" their transactions done through Tuschner & Co. Opp. at 15. But the fact that these accounts came to Tuschner & Co. solely through the efforts of Euroamerican is certainly substantial evidence of a prior, independent relationship between the customers and

---

[14] In enacting Rule 15a-6, the SEC stated that it intended to "codify" its prior rulings regarding foreign broker activities, and it specifically referred to *Bear Stearns* as one such ruling. *See* Release 27017, 54 Fed. Reg. 30030, n.203, and 30019, n.58, citing several similar rulings.

In addition to the examples provided in Release 27017, recent news reports have detailed the ongoing expansion of such foreign broker activities. *See, e.g.*, "Do It Yourself: Online Brokerage Firms Want to Make Overseas Investing Just a Few Clicks Away," THE WALL STREET JOURNAL, Apr. 26, 1999, at R12 (describing actions of two German banks in establishing relationships with U.S. discount brokers, through which German investors are currently able to trade U.S. securities over the internet. Like Euroamerican, (and the Hong Kong broker in *Bear Stearns*), the German banks collect and forward to a U.S. broker the information necessary to open a new account at the U.S. broker for each foreign investor. For example, Schmidt Bank, one of these banks, currently makes the new account forms available on the web site of its broker subsidiary, Consors Discount Broker AG, *see* www.consors.de/. Using these forms, German investors can open accounts at "unserem amerikanishen Partner," Web. St. Securities, a U.S. broker-dealer in Illinois, and effect trades in these accounts over the internet.)

Euroamerican. And, in any event, there is no support for the SEC's startling contention that one rule of law should apply to a "substantial" New York-based securities firm doing business with a "substantial" foreign broker-dealer, while a different rule should apply to a regional securities firm in Minneapolis doing business with a Greek investment firm that is, in the SEC's opinion, less than "substantial." Certainly, neither Section 30(b) nor Rule 15a-6 makes this distinction. Thus, even if Euroamerican *had* been established exclusively to provide its Greek customers access to the U.S. securities markets by dealing with one or more registered U.S. broker-dealers, and did so, that business would still be a foreign "business in securities" and the transactions it effected would still be transactions in securities "with . . . a registered broker-dealer."

While it dismisses the Section 30(b) cases and other authorities cited in the Petition as "scant authority" (Opp. at 11), the SEC does not explain why it makes no reference in its Opposition to the *only* two cases it cited below (discussed at Pet. 24 and 27, n. 29) in support of its contention that Zahareas is an "associated person" of Tuschner & Co. In fact, these unreported district court cases provided no support for the position taken by the SEC regarding Zahareas. But the SEC provides no substitute for its now-jettisoned "authority," thus making it quite clear that **no** court or administrative interpretation has previously held that foreign broker-dealer personnel, who do nothing more than engage in routine securities purchases and sales with a U.S. broker-dealer, and whose activities do not involve any U.S. investor, may nevertheless be deemed "associated persons" of the U.S. broker.

It thus appears unmistakable that the reason the SEC has taken the position it has in this case has less to do with implementing a consistent scheme of regulation than with institutional chagrin that, after being barred from the U.S. securities industry, Zahareas nevertheless found employment in the securities industry of a foreign country. But Greek law

does not preclude Zahareas' activities in Greece. And, as the SEC correctly acknowledged when it enacted Rule 15a-6, it has no valid interest in protecting Greek or other foreign investors from the activities of foreign brokers,[15] and its interest in safeguarding the domestic securities markets is fully satisfied by requiring the interpositioning of a U.S. broker to enter the U.S. markets.[16]

CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be granted.

Respectfully submitted,

James H. Schropp
Counsel of Record
FRIED, FRANK, HARRIS, SHRIVER & JACOBSON
1001 Pennsylvania Avenue, N.W.
Suite 800
Washington, D.C. 20004
(202) 639-7000

Counsel for Petitioners

September 1999

---

[15] "[T]he primary responsibility for protecting foreign investors from wrongful conduct of foreign securities professionals properly lies with foreign securities regulators." SEC Release 34-25801, 1988 WL 239776, *9 (S.E.C.).

[16] "[T]he use of a U.S. broker-dealer to enter the U.S. securities markets provides protection to the U.S. markets." *Id.*.